(24,112)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 407.

CENTRAL VERMONT RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARY THERESA WHITE, ADMINISTRATRIX OF THE ESTATE OF ENOCH L. WHITE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

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1 STATE OF VERMONT,
Franklin County, ss:

Supreme Court.

MARY THERESA WHITE, Adm'r'x Estate of Enoch L. White,
vs.
CENTRAL VERMONT RAILWAY CO., Corporation.

I hereby certify that the original assignment of errors in the above entitled cause, was attached to the writ of error at the time I signed said writ.

Dated at Morrisville, Vermont, this 26 day of February, 1914.

GEORGE M. POWERS,
Chief Justice of the Supreme Court of Vermont.

2 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the Honorable Justices of the Supreme Court of the State of Vermont, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mary Theresa White, Adm'r'x of the estate of Enoch L. White, and the Central Vermont Railway Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Central Vermont Railway Company, as by its complaint appears. We being willing that error, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

the Supreme Court of the United States, together with this
3 writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3rd day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of the U. S. District Court, Dist. of Vermont.]

FREDERICK S. PLATT,
Clerk of the District Court of the United State Within and for the District of Vermont.

Allowed.
GEORGE M. POWERS,
Chief Justice, Supreme Court of Vermont.

[Seal Supreme Court State of Vermont.]

January 31, 1914.

4 [Endorsed:] Central Vermont Railway Company, Plaintiff in Error vs. Mary Theresa White Adm'r'x Estate of Enoch L. White, Defendant in Error. Writ of Error. Filed February 9, 1914. George C. Stevens, Clerk of the Supreme Court of Vermont for the County of Franklin.

5 STATE OF VERMONT,
Franklin County, ss:

CENTRAL VERMONT RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
MARY THERESA WHITE, Adm'r'x of the Estate of Enoch L. White, Defendant in Error.

To G. C. Holmes, of St. Albans, in said county:

You are hereby authorized, appointed and deputized, and, by these Presents, I do authorize, appoint and deputize you to serve upon the above named defendant in Error the citation hereto attached.

Dated at Morrisville in the County of Lamoille and State of Vermont this 26 day of February, 1914.

GEORGE M. POWERS,
Chief Justice of the Supreme Court of Vermont.

6

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mary Theresa White, Adm'r'x of the Estate of Enoch L. White, of St. Albans, Vermont, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court for the County of Franklin in the State of Vermont, wherein the Central Vermont Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Vermont, this 26th day of February 1914.

[Seal Supreme Court State of Vermont.]

GEORGE M. POWERS,
Chief Justice Supreme Court of Vermont.

Attest:

GEO. C. STEVENS,
Clerk of the Supreme Court of Vermont for the County of Franklin.

Return of Service.

STATE OF VERMONT,
Franklin County, ss:

G. C. Holmes, of lawful age, being first duly sworn, on oath deposes and says:

I was duly authorized and deputized by Hon. George M. Powers, Chief Justice of the Supreme Court of the State of Vermont, to serve upon the defendant in error the citation hereto atached.

7 I served the same by delivering personally to W. B. Austins Attorney for Mary Theresa White, Adm'r'x of the estate of Enoch L. White, defendant in error, a true and certified copy of said citation with all endorsements thereon, at St. Albans, Vermont, Feb'y 27th, 1914, at 9-30 o'clock in the forenoon.

Witness my hand this 27th day of Feb., 1914.

G. C. HOLMES.

Sworn to and subscribed to before me this 28th day of February, 1914.

[Seal Franklin County Court, Vermont.]

GEO. C. STEVENS,
Clerk of Franklin County and Ex Officio Notary Public, Franklin County, Vermont.

(My commission expires —.)

Mileage: 2 miles at 10¢, $.20.
Service, $2.00.
— paid by the plaintiff in error.

G. C. HOLMES.

STATE OF VERMONT,
Franklin County, ss:

G. C. Holmes of lawful age, being first duly swron; on oath deposes and says:

I was duly authorized and deputized by Hon. George M. Powers, Chief Justice of the Supreme Court of the State of Vermont, to serve upon the defendant in error the citation hereto attached. I served the same by delivering personally to Mary Theresa White, Admrx. of the Estate of Enoch L. White, defendant in error, an true and certified copy of said citation with all endorsements thereon, at St. Albans, Vermont, February 28, at 3:20 o'clock P. M.

Witness my hand this 28th day of February, 1914.

G. C. HOLMES.

Sworn to and subscribed to before me this 28th day of February, 1914.

[Seal Franklin County Court, Vermont.]

GEO. C. STEVENS,
Clerk of Franklin County and Ex Officio Notary Public, Franklin County, Vermont.

8 [Endorsed:] Central Vermont Railway Co., Plaintiff in Error, vs. Mary Theresa White, Adm'r'x Estate of Enoch L. White, Defendant in Error. Citation. Filed Feb. 26, 1914. Geo. C. Stevens, Clerk of the Supreme Court of Vermont for Franklin County. Returned Served Feb. 28, 1914. Geo. C. Stevens, Clerk of the Supreme Court of Vermont for Franklin County.

9 UNITED STATES OF AMERICA,
State of Vermont, Franklin County, ss:

I, George C. Stevens, Clerk of the County of Franklin and Clerk of the Supreme Court within and for the County of Franklin in the State of Vermont, the same being a Court of Record and having a Seal, hereto attached, by virtue of the foregoing Writ of Error, and in obedience thereto do hereby certify that the following pages numbered 1 to 645 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of the Central Vermont Railway Company, Plaintiff in error (defendant below), vs. Mary Theresa White, Adm'r'x Estate of Enoch L. White, Defendant in error (plaintiff below), in accordance with the Præcippe of the plaintiff in error and the Præcipe of the defendant in error, hereto annexed, as full and complete as the same remain of record and on file in the office of the clerk of said Court, and that the same is a true copy of record as examined and compared by me,

together with the opinion of the Supreme Court of the State of Vermont rendered in said cause, duly certified, annexed.

In testimony whereof I have hereunto affixed the seal of said Court and subscribed my name at the City of St. Albans, in the County of Franklin aforesaid this 2nd day of March, 1914.

[Seal Supreme Court State of Vermont.]

GEO. C. STEVENS, *Clerk.*

Costs of Suit.

Plaintiff's Costs, $199.65 Paid by Mary Theresa White, Admrx., (Defendant in Error).

Defendant's Costs, $120.32. Paid by the Central Vermont Railway Company, Plaintiff in Error.

Costs of Transcript $125.00. Paid by the Central Vermont Railway Company, Plaintiff in Error.

(Taxed by agreement.)

GEO. C. STEVENS, *Clerk.*

10 STATE OF VERMONT,
Lamoille County, ss:

I, George M. Powers, Chief Justice of the Supreme Court of the State of Vermont and Chief Justice of said Supreme Court for the County of Franklin, the same being a Court of Record and having a Seal, do hereby certify that George C. Stevens, who has signed the foregoing certificate, was at the time of signing the same, and still is, Clerk of said Supreme Court of the State of Vermont for said County of Franklin: that his signature thereto is genuine; that his attestation is in due form, and full faith and credit is thereunto given in all the Courts of this State and that the Seal thereunto affixed is the seal of said Supreme Court.

Given under my hand this 2nd day of March, A. D., 1914, at Morrisville in the County of Lamoille.

[Seal Supreme Court State of Vermont.]

GEORGE M. POWERS,
Chief Justice.

11 STATE OF VERMONT,
Franklin County, ss:

I, Geo. C. Stevens, Clerk of the County of Franklin aforesaid, and Clerk of the Supreme Court of the State of Vermont for said County hereby certify that the Hon. George M. Powers, whose name is subscribed to the certificate of attestation, hereto annexed, and written thereon was at the time of subscribing to such certificate and still is, Chief Justice of the Supreme Court of the State of Vermont, and Chief Justice of the Supreme Court the State of Vermont for the County of Franklin, elected, commissioned, sworn and duly qualified

to certify the same. And further, that I am well acquainted with the hand writing of said Chief Justice, and verily believe that the signature to said Certificate is genuine.

In testimony whereof, I have hereunto subscribed my name, and affixed the Seal of said Court at the City of St. Albans in said County this 2nd day of March, A. D. 1914.

[Seal Supreme Court State of Vermont.]

GEO. C. STEVENS, *Clerk.*

12 STATE OF VERMONT:

Supreme Court, January Term, A. D. 1914.

No. 78.

MARY THERESA WHITE, Adm'x of the Estate of Enoch L. White,
vs.
THE CENTRAL VERMONT RAILWAY COMPANY.

Be it remembered. that at a term of the Honorable County Court, begun and held at the City of St. Albans, within and for the County of Franklin, on the second Tuesday of March, A. D. 1913, being the 11th day of said month and being a regular stated term of said Court, comes Mary Theresa White, administratrix of the estate of Enoch L. White, late of the City of St. Albans in said County, deceased and files her writ against the Central Vermont Railway Company, a corporation organized under the laws of the State of Vermont, and having its principal place of business a- the City of St. Albans, aforesaid, which writ is in the words and figures following:

13 STATE OF VERMONT,
County of Franklin, ss:

To any Sheriff or Constable in the State, Greeting:

By the Authority of the State of Vermont, You are hereby commanded to attach the goods, chattels or estate of the Central Vermont Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Vermont, and having its prinicip*le* office and place of business at the City of St. Albans, in the County of Franklin and State of Vermont, to the value of Twenty Thousand Dollars, ($20,000), and it notify thereof according to law; and also notify it to appear before the Franklin County Court at the City of St. Albans, within and for the County of Franklin, and also notify it to cause its appearance herein to be entered with the Clerk of said Court, on or before the expiration of forty-two days from the date hereof, then and there in said Court to answer unto Mary Theresa White, of the City of St. Albans, aforesaid, Administratrix of the estate of Enoch L. White, deceased, duly appointed as such Administratrix by the Honorable Probate Court within and

for the District of Franklin, on the 27th day of December, A. D. 1912, as by her letters of administration, ready to be produced in Court, will more fully appear.

14 *Plaintiff's Declaration.*

In a plea of the case for that whereas the defendant long prior to and on the 12th day of January, A. D. 1912, had been and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Vermont, as a common carrier, having its principal place of business at the City of St. Albans, in the County of Franklin and State of Vermont; and the defendant was then and there on the day and year aforesaid, to wit, at the City of St. Albans, aforesaid, the owner, operator and controller and manager of extensive lines of railroad in the State of Vermont, and elsewhere, extending from St. Johns, in the Province of Quebec in the Dominion of Canada, to said City of St. Albans, and from said City of St. Albans to the station of White River Junction, in the town of Hartford, in the County of Windsor and State of Vermont, and they were then and there common carriers by railroad, and as such were then and there engaged and in connection with certain other railroads connected therewith, in commerce between several States and the Province of Quebec, and subject to the laws of the State of Vermont and subject to and according to the laws of the United States enacted and governing said purpose, including road beds, yards, tracks, switches, railway stations, engines, cars, telegraph lines, telephone lines and appurtenances therewith and adjoining thereto.

And the plaintiff avers that heretofore, to wit, and on the 12th day of January, A. D. 1912, to wit, at the City of St. Albans, aforesaid, the said defendant was then and there maintaining, controlling and operating as a part of said railroad that line of said railroad extending from the City of St. Albans, aforesaid, through said City aforesaid, and the towns of St. Albans and Georgia, in said County of Franklin and State of Vermont, through the towns of Milton, Colchester, Essex, Williston, Richmond and Bolton, in the County of Chittenden and State of Vermont; through the towns of Duxbury, Waterbury, Middlesex, Montpelier, Northfield and Roxbury, in the County of Washington and State of Vermont; through the town of Granville, in the County of Addison and State of Vermont, through the towns of Braintree and Randolph, in the County of Orange and State of Vermont, and through the towns of Bethel, Royalton, Sharon and Hartford, and to the station and railroad of White River Junction, in the town of Hartford, in the County of Windsor and State of Vermont, and then and there ran its engines and cars over and upon said line, to wit, from the City of St. Albans, aforesaid, to White River Junction, aforesaid, for the carrying of passengers and freight for hire and reward to said defendant in that behalf as a common carrier over said line of road, subject to
15 the laws of the State of Vermont, and according to the laws of the United States, enacted for said purpose; and that said

defendant maintaining, controlling and operating said line of railroad as aforesaid, thereupon, heretofore, to wit, on the 12th day of January, A. D. 1912, to wit, at the City of St. Albans, the plaintiff's, intestate, Enoch L. White, at the special instance and request of the said defendant, became and was, and for a long time prior thereto had been an employee of said defendant, as a freight brakeman, and subject to the orders, directions and command of said defendant, and the plaintiff avers, that it was then and there, to wit, on the day and year aforesaid, to wit, at the City of St. Albans, the duty of the defendant to operate and manage its said road, and the engines, cars and trains used thereon, in a safe and secure manner, and to operate and manage its said road and the engines, cars and trains thereon, in such a manner that said engines, cars and trains should not collide with each other, and to use due and proper skill in the construction, maintenance and management and operation of said road, and to maintain and use sufficient and proper train signals for governing engines, cars and trains, and to use due and proper skill in the selection and employment of servants, and the control of the same, and to give proper and sufficient orders and directions for the safe and secure operation of said engines, cars and trains, so as to protect passengers, employees and freight, and the plaintiff's intestate from injury and damage thereon.

Yet the said defendant, neglecting and disregarding its duty, did not on the day and year aforesaid, to wit, on the 12th day of January, 1912, to wit, at the City of St. Albans, and the towns of Bethel, Randolph and Braintree, aforesaid, operate, manage and control said railroad, its engines, cars and trains, and manage and control its employees in a safe, secure and prudent manner, and did not then and there run its cars and engines in a careful and prudent manner, and did not then and there employ, and have in its employ careful, competent and prudent employees, and did not then and there require of its employees to know and observe such rules and regulations as then and there were necessary for the safety and security of passengers, employes and freight, and the plaintiff's intestate thereon; but on the contrary thereof, the defendant then and there, to wit, at the City of St. Albans, aforesaid, to wit, at Bethel, Randolph and Braintree, aforesaid, operated managed and controlled said railroad, its engines and cars, and managed and controlled its employees in an unsafe, insecure, careless and dangerous manner, and the said defendant then and there ran its cars and engines in a careless, imprudent and dangerous manner, and the said defendant then and there employed, and suffered to remain in its employment, careless, incompetent and negligent men as conductors, engineers, station agents, train dispatchers and telegraph operators, and the said defendant did not then and there require said conductors, engineers, station agents, train dispatchers and telegraph operators to observe such rules and regulations as were then and there necessary
16 for the safety and security of passengers, employees and freight, and the plaintiff's intestate, upon said defendant's

road, all of which was well known to the officers of the defendant, and dangerous to the lives of passengers, employees and freight and plaintiff's intestate on passing through said railroad, all of which was not known to the plaintiff's intestate.

And the plaintiff further avers that on, to wit, the 12th day of January, A. D. 1912, at a certain point between the stations of Randolph and Braintree, aforesaid, solely by reason of the carelessness and negligence of the defendant, its agents, servants and employees, as aforesaid, a collision between two of the defendant's trains, operated and controlled as aforesaid, occurred, and the plaintiff's intestate, Enoch L. White, who was then and there in the employ of the said defendant as a brakeman, and in the performance of his duty, as such, was then and there, by means thereof, and solely by reason of the negligence of the defendant, its agents and servants as aforesaid, and without fault or contributory negligence on his part, instantly killed.

And the plaintiff further avers that the said Enoch L. White left surviving him a widow, the said Mary Theresa White, then a pregnant woman, and about to give birth to a child, and that on the 12th day of February, 1912, said child was born alive, and is now named Elsiet White; also one son, Enoch L. M. White, now seven years old past, and Mildred A. White, now four years old past, all of whom are still living.

And the plaintiff further avers that said Enoch L. White died intestate, and that said Mary Theresa White, on the 27th day of December, 1912, was duly appointed Administratrix de bonus non of his estate, by the Honorable Probate Court within and for the District of Franklin, Vermont, and she brings this suit for the benefit of said widow (wife) and next of kin minor children (all of whom are now living) under and by the virtue of the Statute and laws in such case made and provided.

Also in a further plea of the case for that whereas, heretofore, to wit, on the 12th day of January, A. D. 1912, to wit, at the City of St. Albans, in said County of Franklin and State of Vermont, the defendant was the owner and in possession and control, and was operating a certain other Railroad in the State of Vermont, to wit, extending from the City of St. Johns, in the Province of Quebec, and Dominion of Canada, through the City of St. Albans, aforesaid, and towns of St. Albans and Georgia, in said County of Franklin, through the town of Milton, Colchester, Essex, Williston, Richmond and Bolton, in the County of Chittenden, and State of Vermont; through the towns of Duxbury, Waterbury, Middlesex, Montpelier, Northfield and Roxbury, in the County of Washington and State of Vermont; through the town of Granville, in the County of Addison and State of Vermont; through the towns of Braintree and Randolph, in the County of Orange and State of Vermont, and through the towns of Bethel, Royalton, Sharon and Hart-
17 ford, and to the station of White River Junction, in the County of Windsor and State of Vermont, and there connecting with other lines of railroad running through the State of Massachusetts and New Hampshire, and was then and there en-

gaged in Interstate Commerce in the business of a common carrier thereon, and running engines and cars over and upon said road, to wit, from the City of St. Johns, through the City of St. Albans, to White River Junction, aforesaid, and said engines and cars were then and there under the care, custody and control of said defendant, its agents and servants, together with road beds, yards, tracks, switches, telegraph and telephone lines, and appurtenances connected therewith, and adjoining thereto.

And the plaintiff avers that the defendant's main line, namely, from the City of St. Albans, aforesaid, to White River Junction, aforesaid, to wit, between the stations of Braintree, Randolph and Bethel, was a single track, and it was then and there, and for a long space of time prior thereto, the defendant's custom to direct station agents, telegraph and telephone operators, engineers and conductors how and when to operate said engines, cars by telegraph and telephone orders from the office of the Train Despatcher at the City of St. Albans, aforesaid. And the plaintiff further avers that the plaintiff's intestate, Enoch L. White, at the special instance and request of the said defendant, heretofore, to wit, on the 12th day of January, A. D. 1912, to wit, at the City of St. Albans, aforesaid, became and was for a long time prior thereto an employee of the defendant as a freight brakeman.

And the plaintiff further avers that it then and there became and was the duty of the defendant, to wit, on the 12th day of January, A. D. 1912, to wit, at the City of St. Albans, aforesaid, to wit, at the stations of Bethel, Braintree and Randolph, and White River Junction, aforesaid, in running and operating said road, its trains and engines, to suitably construct, equip and maintain its said road, telegraph and telephone lines, to wit, at the City of St. Albans, aforesaid, to wit, at Bethel, Randolph and Braintree and White River Junction aforesaid, in a prudent, safe and secure manner, and to suitably construct and equip station houses, buildings and signal boards of good and sufficient quality along its lines aforesaid, to wit, at Bethel and Randolph aforesaid, and to operate and manage its engines, cars and signal boards and employees upon said road in a careful and prudent manner, and to use due and proper skill in the management of the same, so as to protect employees and freight, and the plaintiff's intestate from injury and damage thereon; it then and there became and was the duty of the defendant to make proper rules and require its employees to observe all necessary directions and rules in the management and running of its trains, so as to protect employees and freight, and the plaintiff's intestate from injury and damage thereon, and it then and there became and was the duty of the defendant to use proper care, caution and skill in the selection and employment of servants, and to furnish
18 station agents and operators, and good and sufficient stations or buildings, with proper signal boards and sign boards, for the necessary use in the movement of trains, to insure the safe receipt and transmission of such orders as became necessary relative to the operation of said road and the movement of its engines, trains and cars aforesaid, from and to the office of the said Train Despatcher at St.

Albans, aforesaid, at, to wit, Bethel, Randolph and Braintree aforesaid, so as to protect employees and freight, and the plaintiff's intestate from injury and damage thereon.

And the plaintiff further avers that on, to wit, the 12th day of January, A. D. 1912, to wit, at St. Albans, aforesaid, and to wit, at Bethel, Randolph, and Braintree aforesaid, the defendant wrongfully disregarded its duties in this behalf, and did not suitably construct and equip its said Road and railroad station- at Bethel, Randolph and Braintree, aforesaid, and did not suitably construct and equip station houses and buildings and signal boards of good and sufficient quality, along its line, to wit, at Bethel, Randolph and Braintree, aforesaid, and did not operate and manage the same in a sufficient and secure manner, and did not operate and manage its engines, cars, signal boards and employees upon said road in a careful and prudent manner, and did not use due and proper skill in the management and control of the same, and did not use due and proper skill in the selection and employment of servants, and did not make proper rules and require such employees to observe the necessary rules in the management and running of its trains, and did not execute and deliver to said station agents and operators along said line proper orders and directions for the running and passing of trains thereon, to wit, at Bethel, Randolph and Braintree, aforesaid, in a safe and secure manner, for the operation of said road and the movement of its engines, trains and cars aforesaid, from the office of said Train Despatcher from St. Albans, aforesaid, at, to wit, Bethel, Randolph and Braintree aforesaid.

And the plaintiff further avers that, to wit, on the 12th day of January, 1912, the plaintiff's intestate, Enoch L. White, was then and there in the performance of his said duty as freight brakeman, and was then and there riding in and upon extra freight train No. 401, so-called, with engine 401, with cars thereto attached, owned, operated and controlled by the defendant, being there ordered and directed by the defendant to run extra from White River Junction to Roxbury, in a northerly direction, and having the right of track and way over and upon said line of railroad, from White River Junction to Roxbury aforesaid, and while the said Enoch L. White was thus engaged, and in the exercise of due care on his part, it was the duty of the defendant to carry him safely over its said road, and on the same day, to wit, the 12th day of January, A. D. 1912, to wit, at the City of St. Albans, aforesaid, and to wit, at the stations of Bethel, Randolph and Braintree aforesaid, the defendant disregarded, omitted and neglected all of its duties aforesaid, and carelessly and negligently permitted and allowed their said train
19 designated extra freight No. 708, owned, operated and controlled by said defendant, and running extra from said station of White River Junction to Roxbury, in a northerly direction, over and upon the same track on which said engine and train No. 401 had the right of way, and ordered to pass and go over, to wit, between the stations of Bethel, Randolph and Braintree to be and run in a northerly direction, at the same time which said engine No. 401 was then and there running in a northerly direction, and by reason

thereof, and the failure of said defendant to issue and deliver orders to the conductors and engineers on each of said trains, to look out for and not run upon the other at the stations of Bethel, Randolph and Braintree aforesaid, or on said single track, extending from said station of Bethel to said station of Braintree, and the neglect and disregard of all of its duties, aforesaid, by said defendant, said engine No. 401 and cars connected therewith, upon which the said Enoch L. White was in the due performance of his duties, aforesaid, was run upon and collided with said engine 708 and cars connected therewith, namely, extra freight No. 708, to wit, between the stations of Randolph and Braintree, and solely by reason thereof, and without fault or contributory negligence on the part of the plaintiff's intestate, said Enoch L. White was instantly killed.

And the plaintiff further avers that said Enoch L. White left surviving him a widow, the said Mary Theresa White, then a pregnant woman and about to give birth to a child, and that on the 12th day of February, A. D. 1912, said child was born alive, and is now named Elsiet White, also one son, Enoch L. M. White, now seven years old past, and Mary A. White, now fours years old past, all of whom are still living.

And the plaintiff further avers that said Enoch L. White died intestate, and that said Mary Theresa White, on the 27th day of December, A. D. 1912, was duly appointed Administratrix de bonus non, of his estate, by the Honorable Probate Court within and for the District of Franklin, Vermont, and she brings this suit for the benefit of said widow (wife) and the next of kin minor children (all of whom are now living), under and by virtue of the Statute and laws in such case made and provided.

And the plaintiff further avers that the death of the said Enoch L. White was caused by the wrongful act and neglect of said defendant, and that said act and neglect was such as would have netitled the said Enoch L. White, if living, to maintain an action therefor.

Also, in a further plea of the case, for that heretofore, to wit, on the 12th day of January, 1912, and prior thereto, the defendant was a railroad corporation, duly organized under the laws of the State of Vermont, operating a line of railroad and single track running from St. Johns, in the Province of Quebec and Dominion of Canada, to White River Junction, in the County of Windsor and State of Vermont, where it connected with other railroads and stations in the States of New Hampshire, Connecticut and Massachusetts, and was engaged in Interstate Commerce in the carrying of passengers and freight for hire and profit, and that said line of road passed through the city of St. Albans, in the County of Franklin and State of Vermont, through the towns of Braintree, Randolph and Bethel, in the State of Vermont, and the plaintiff's intestate, said Enoch L. White, was then and there employed as a freight brakeman, by the defendant as a servant in the operation and running of a certain train upon the said defendant's road, which was designated by said company in the operation of said railroad, as extra freight, cars and engine No. 401.

And this plaintiff avers that it was necessary and essential to the ordinary safety of said railroad and road bed in operation, to keep the same clear of obstruction, and especially of other locomotives and trains liable to collide with and do injury to the train aforesaid, so operated by said defendant, on which the said Enoch L. White was so employed as a freight brakeman; and for the purpose of keeping said road clear of obstruction, it was the duty of the defendant then and there to provide certain rules, train despatchers, telegraph and telephone operators to regulate the movement of trains, anr report the same, so as to prevent collisions upon said railroad.

And the plaintiff further avers that the said Enoch L. White, on the day and year aforesaid, was in the performance of his said duty as freight brakeman as aforesaid, and in the operation of his said train, in a northerly direction from White River Junction, aforesaid, to the station of Roxbury, of the defendant, at Roxbury, in the County of Washington and State of Vermont, and in so doing, and throughout the happenings of the grievances hereinafter stated, the said Enoch L. White was in the exercise of due care and caution on his part, and was not negligent.

Yet the said defendant, not regarding its duty in that behalf, did not use good and sufficient orders and rules, or employ reasonable, skillful and competent despatchers and operators to regulate the movement of its trains, and to report the same, and did not use reasonable care in keeping said road bed clear from obstruction, liable to cause collision, and did not use reasonable care in providing suitable orders and signals, and competent servants and agents upon said railroad, but then and there made default, and was negligent.

And the plaintiff further avers, that the said defendant then there had and employed negligent, careless, incompetent and unsuitable train despatchers and operators, and other servants, and negligently, carelessly, sent out upon said track another locomotive and train of cars, and negligently and carelessly caused and permitted the same to be sent out in such a manner as to run upon and collide with the locomotive and train on which the said Enoch L. White was then and there running and in the performance of his said duty as freight brakeman thereon, and negligently, carelessly and improperly failed to warn and advise the engineer and con-
21 ductor, and the said Enoch L. White, on said train, of the said danger, so brought about by the negligence, carelessness and incompetence of the said defendant, and its servants and agents, so that by reason of the premises, and by reason of the negligence of said defendant, and by reason of the incompetence, unskillfulness and carelessness of the defendant's servants aforesaid, the said train, engine and cars upon which the said Enoch L. White was then and there in the performance of his duty as freight brakeman thereof, was then and there wrecked and broken, and the said Enoch L. White, without fault or contributory negligence on his part, was thereby to wit, between the stations of Randolph and Braintree, to wit, at a point about one and one-half miles north of said station at Randolph, on the day and year aforesaid, was instantly killed.

And the plaintiff further avers that the said Enoch L. White left surviving him a widow, the said Mary Theresa White, then a pregnant woman, and about to give birth to a child, and that on the 12th day of February, A. D. 1912, said child was born alive, and is now named Elsiet White, also one son, Enoch L. M. White, now seven years old past, and Mary A. White, now four years old past, all of whom are still living.

And the plaintiff further avers that said Enoch L. White died intestate, and that said Mary Theresa White, on the 27th day of December, A. D. 1912, was duly appointed Administratrix de bonus non, of his estate, by the Honorable Probate Court within and for the District of Franklin, Vermont, and she brings this suit for the benefit of said widow (wife) and next of kin minor children (all of whom are now living), under and by virtue of the Statute and laws in such case made and provided.

And the plaintiff further avers that the death of the said Enoch L. White was caused by the wrongful act and neglect of said defendant, and that said act and neglect was such as would have entitled the said Enoch L. White, if living, to maintain an action therefor.

And also, in a further plea of the case, for that, whereas, heretofore, to wit, on the 12th day of January, A. D. 1912, at the City of St. Albans, aforesaid, the defendant was the owner, in possession and control, and was operating a certain other railroad in the State of Vermont, and other States of the United States, and in a foreign nation, to wit, in the Province of Quebec and Dominion of Canada, extending from St. Johns, aforesaid, to and through the City of St. Albans, aforesaid, to and through the towns of said Braintree, Randolph and Bethel, in said State of Vermont, and to White River Junction, in the Town of Hartford, in the County of Windsor and State of Vermont, and from thence in connection with other lines of railroad to and through the States of Massachusetts and Connecticut, to the City of New London, in the State of Connecticut, and was then and there engaged in commerce between said several States, and between the State of Vermont and Dominion of Canada,
as a common carrier, by said railroad, of passengers and
22 freight, and was then and there operating and running engine- and cars and trains over and upon said railroad, and said engines and cars and trains were then and there under the care, custody and control of said defendant, its agents and servants, together with road bed, yards, stations, signals, order boards, tracks, switches, telegraph and telephone lines and appurtenances connected therewith, and relating to said business and said railroad.

And the plaintiff avers that that portion of the main line of the defendant's railroad, operated between the stations of Braintree, Randolph and Bethel, was then and there a single track, and that on said line the station of Braintree was northerly of said station of Randolph, and that said station of Bethel was southerly from said station of Randolph, and that it was then and there, and for a long time prior thereto, had been the defendant's custom to direct station agents, telegraph and telephone operators, conductors and

engineers, how and when to operate said engines, cars and trains, by telegraphic and telephone orders from the office of the train despatcher of the defendant, at the City of St. Albans, aforesaid.

And the plaintiff further avers that the plaintiff's intestate, Enoch L. White, at the special instance and request of the said defendant, heretofore, to wit, on the 12th day of January, A. D. 1912, to wit, at the City of St. Albans, aforesaid, was and for a long time prior thereto had been, an employee of the defendant, as freight brakeman, under the direction of the defendant, of a freight train, operated and run by said defendant, to wit, engine No. 401, and cars and van connected therewith, running on said single track, from said station of White River Junction, northerly, to Roxbury, and passing along the line of said single track from the station of Bethel, aforesaid, to said stations of Randolph and Braintree, aforesaid.

And it then and there, to wit, on the 12th day of January, A. D. 1912, at the City of St. Albans, aforesaid, and at said Bethel, Randolph and Braintree, became and was the duty of the defendant, in operating said railroad, to safely and securely construct, equip and maintain its engines and cars aforesaid in a safe and secure manner; to construct and maintain its engines and cars so that said cars and engines might be securely operated and run over and upon said Railroad, and that said engines and trains should not collide with each other, and that said engines and cars should be so constructed, maintained and operated that the employees and servants of said Road might pass over and upon said Road and not — hindered or impeded in seeing or observing other trains passing over said Railroad, and not collide with each other; to make, establish, maintain and use with care, prudence and skill, sufficient, proper and effective orders, regulations and rules governing the operation of said engines, cars and trains thereon; to maintain and use with due care, prudence and skill the means and instrumentalities to convey to and insure the receipt by conductors of orders and directions necessary to operate
23 engines, cars and trains with safety, relative to the operation of said Road, and relative to the hazards of said business; to furnish station agents, telegraph and telephone operators, necessary and proper orders and instructions for the movement and stopping of engines, cars and trains thereon; and to insure the safe and secure receipt and directions by said agents and operators, of such orders as became necessary in the careful, prudent and skillful operation of said Railroad, relative to the operation of said railroad and the movement and stopping and passing of its engines, cars and trains aforesaid, from said Train Despatcher, to said agents and operators, to telegraph to and cause to be received by conductors and engineers proper and safe orders and directions for the safe and secure operation of said engines, cars and trains, to make, establish, maintain and enforce with due care, prudence and skill rules necessary to the proper operation of said railroad, engines, cars and trains, and necessary to the proper,

prompt and sufficiently early transmission by train despatcher of such orders, and necessary to the proper, prompt and early receipt of such orders by agents, operators, conductors and engineers, to prevent collisions by and between said engines, cars and trains, and to use due and proper care, caution, and skill in the selection and employment of vice principals and servants, and to select and employ for operators to receive said orders governing the operation of said engines, cars and trains, and to transmit said orders to conductors and engineers of said engines, cars and trains, servants of proper discretion, judgment, care, prudence and skill, all to protect the plaintiff's intestate from injury and damage in reference to his said employment thereon.

Yet the said defendant then and there, to wit, on the 12th day of January, A. D. 1912, at the City of St. Albans, aforesaid, and at Braintree, Randolph and Bethel, aforesaid, wrongfully disregarded and neglected to perform its duties in this behalf, and the said defendant then and there carelessly and negligently failed to safely and securely construct and maintain its said engines, cars and trains, and then and there carelessly and negligently operated and managed its said engines and cars and trains, consisting of said engine No. 708 and cars connected therewith, which said engine No. 708 was defective, out of repair and insufficient to pass over and upon said single track at said time and place, which said engine 708 and cars connected therewith was ordered and directed by the defendant to run over and upon said Road from said White River Junction to Roxbury, in a northerly direction, that said engine 708, aforesaid, was so defective at said time and place that the engineer, conductor and employees of said defendant could not use the same with care and prudence and safety to other trains running upon said Road, because said engine was out of repair, leaked steam, so that the employees thereon could not see other cars and trains in front of them, and upon said Road, on said 12th day of January, 1912, to wit, at Bethel, Randolph and Braintree, aforesaid, and did not then and there insure the safe
24 and secure receipt and transmission by such agents and operators of such orders as became then and there necessary in the careful, prudent and skillful operation of said Road, and the movement, stopping and passing of its engines, cars and trains aforesaid, from said Train Despatcher, agents and operators, and negligently failed to transmit to and cause to be received by conductors and engineers, proper and sufficient orders and directions for the safe and secure operation of said engines, cars and trains, to wit, to the conductor and engineer of said train 708, at Bethel, to wit, on the 12th day of January, A. D. 1912, to wit, at Randolph and Braintree aforesaid, in a proper, prompt and efficient manner, and an early receipt of such directions, rules and orders to said conductor and engineer of said train 708, by its agents and operators, to prevent collisions by and between said engines, cars and trains, and particularly so that said engine 401, and cars connected therewith, on which the plaintiff's intestate was properly

riding, in the due performance of his duty, should not be run upon and collided with said engine 708, and cars connected therewith, to wit, at Bethel, Randolph and Braintree aforesaid.

And the plaintiff further avers that then and there, to wit, on the 12th day of January, A. D. 1912, at the City of St. Albans, aforesaid, and at Bethel, Randolph and Braintree aforesaid, the plaintiff's intestate, Enoch L. White, was in the careful, prudent and faithful performance of his said duty, as brakeman and servant of the defendant, to wit, upon said train No. 401 and cars connected therewith, and was riding in van drawn by said engine No. 401, northerly, from said station of Bethel, as then and there ordered and directed by said defendant to run on said extra freight No. 401, from White River Junction to Roxbury, in said northerly direction, and having the right of track and way over and upon said line of Railroad, from said station of Bethel to Braintree, aforesaid, and while the said Enoch L. White, the plaintiff's intestate, was thus engaged in the execution of said order and direction of the defendant, and in the exercise of due care on his part, it was the duty of the defendant to carry him safely over said Road; and on the same way, at the said City of St. Albans, said Bethel, Randolph and Braintree, the defendant wrongfully disregarded all its duties aforesaid, carelessly and negligently permitted and allowed another engine, cars and train, operated and controlled by the said defendant, to wit, engine No. 708, with cars attached thereto, running extra from said White River Junction, northerly, on said single track of the defendant, to leave said Bethel without orders and notice to the conductor and engineer of said engine and cars 708, at said Bethel station; that said engine and cars 401 had left said station of Bethel immediately before said engine and cars 708, and that there was danger of a collision between said train engine and cars No. 708, and engine and cars 401, on which the plaintiff's intestate was then and there riding, and having the right of track and way, and were occupying and running northerly between said Bethel Station, Randolph and Braintree, and did then and there order and direct the conductor and engineer of said engine 708 and cars to run over and upon said single track, which said engine No. 708 was then and there defective, out of repair and leaking steam, so that engine 401 and cars connected therewith could not be seen by said conductor and engineer, on account of the improper escape of steam from said engine No. 708, all of which was well known, or ought to have been known to the defendant, which said engine 401 and cars connected therewith were then and there, to wit, between the stations of Randolph and Braintree was then and there passing, in a northerly direction, on the same track over which said engine 708 was runnigg northerly, to wit, between the stations of Randolph and Braintree, aforesaid, and by reason thereof, and by reason of the violation, neglect and disregard of all its duties, aforesaid, by said defendant, said engine and cars No. 401, upon which the plaintiff'st intestate was then and there riding in the due per-

formance of his duties, and without any knowledge by the plaintiff's intestate of the premises, was run into by and collided with said engine No. 708, with cars attached, and solely by reason thereof, and without fault or contributory negligence on the part of the plaintiff's intestate, and while the plaintiff's intestate was in the line of his duty, and the plaintiff's intestate was instantly killed.

And the plaintiff further avers that the said Enoch L. White left surviging him a widow, the said Mary Theresa White, then a pregnant woman, and about to give birth to a child, and that on the 12th day of February, A. D. 1912, said child was born alive, and is now named Elsiet White, also one son, Enoch L. M. White, now seven years old past, and Mary A. White, now four years old past, all of whom are still living.

And the plaintiff further avers that said Enoch L. White died intestate, and that said Mary Theresa White, on the 27th day of December, A. D. 1912, was duly appointed administratrix de bonus non, of his estate, by the Honorable Probate Court within and for the District of Franklin, Vermont, and she brings this suit for the benefit of said widow (wife) and next of kin minor children (all of whom are now living), under and by virtue of the Statute and laws in such case made and provided.

And the plaintiff further avers that the death of the said Enoch L. White was caused by the wrongful act and neglect of said defendant, and that said act and neglect was such as would have entitled the said Enoch L. White, if living, to maintain an action therefor.

To the damage of the plaintiff, as such administratrix aforesaid, as she says, the sum of Twenty Thousand Dollars, ($20,000) for the recovery of which, with just costs, the plaintiff, as such administratrix, brings this suit.

26 Fail not, but service and return make within twenty-one days from the date hereof.

Dated at the City of St. Albans, in the County of Franklin, aforesaid, the second day of January, A. D. 1913.

HIRAM P. DEE,
Justice of the Peace.

C. G. Austin recognized to the defendant in the sum of Fifty Dollars, as surety for the costs of prosecution as the law directs.

Before me,

HIRAM P. DEE,
Justice of the Peace.

Recognizance approved by me this 22 day of January, 1913.

GEO. C. STEVENS, *Clerk.*

STATE OF VERMONT,
Franklin County, ss:

At the City of St. Albans, in said County of Franklin, this 22nd day of January, A. D. 1913, I made service of this writ by attaching as the property of said defendant all the real estate situated, lying and being in said City of St. Albans, said real estate being

bounded as said City of St. Albans is bounded, and is particularly described as the railroad station, depots, car shops, road bed, lands and buildings belonging to said efendant, within said City limits of St. Albans, and on the same day, I lo-ged a true and attested copy of this writ with a list and description of the property so attached, in the City Clerk's office in said City of St. Albans, for record, and on the same day, at said City of St. Albans, I completed service of this writ on said defendant, by delivering to W. H. Chaffee, Clerk of said corporation defendant, a copy of said writ, with this my return thereon and hereon endorsed.

Attest,

G. C. HOLMES, *Sheriff.*

Fees:

Travel 2 m.....	$ .20
2 copies.....	10.00
City Clerk,.....	.50
	$10.70

27 Endorsed: County Court writ. Dated January 2, 1913. Mary Theresa White, Admx. of the Estate of Enoch L. White, vs. The Central Vermont Railway Company. County Court, Franklin County. Filed Jan. 22, 1913. Geo. C. Stevens, Clerk. C. G. Austin & Sons, Att'ys for Pl'ff.

28 The foregoing cause, filed in the office of the Clerk of Franklin County January 22, 1913, was duly entered on the docket of the Franklin County Court at its regular stated term, begun and held at the City of St. Albans within and for said County on the second Tuesday of March, 1913, when the plaintiff comes into court by her attorneys, C. G. Austin & Sons to prosecute the same and the defendant, by its attorneys C. W. Witters, Esq., Harry B. Amey, Esq., and C. S. Palmer, Esq., appears in court, and for plea to the foregoing declaration says that the defendant is not guilty in manner and form as the plaintiff in her declaration has alleged. And the defendant files March 11, 1913, its motion to amend its pleadings which motion is in the words following:

STATE OF VERMONT,
Franklin County, ss:

County Court, March Term, 1913.

MARY T. WHITE, Adm'r'x,
vs.
CENTRAL VERMONT RAILWAY CO.

In the above entitled cause, the defendant moves this Honorable Court to amend its pleadings by adding thereto the following plea.

CENTRAL VERMONT RAILWAY CO.,
By C. W. WITTERS AND
HARRY B. AMEY,
Attorneys.

STATE OF VERMONT,
Franklin County, ss:

County Court, March Term, 1913.

29 MARY THERESA WHITE, Adm'r'x of the Estate of Enoch L. White,
vs.
THE CENTRAL VERMONT RAILWAY COMPANY.

41.

Defendant's Second Plea.

And now the said Central Vermont Railway Company, by its attorney, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have or maintain its aforesaid action thereof against it, the defendant, because the defendant says that the said supposed cause of action, and each and everyone of them, (if any such have accrued to said plaintiff) accrued subsequent to the taking effect of an act of Congress entitled, "An act re*a*lting to the Liability of Common Carriers by railroad to their employees in certain cases, approved April 22, 1908; and that at the happenings of the several things mentioned and set forth in the plaintiff's declaration, the defendant was and ever since has been a common carrier by railroad engaged in commerce between certain states of the United States, to wit, between the State of Vermont and the State of Massachusetts and the State of Connecticut, and between the State of Vermont and a foreign nation, to wit, the Dominion of Canada, and at the time of the happening of the said several things in the plaintiff's said declaration mentioned and at the time the plaintiff received the injuries complained of in his declartaion, he, the plaintiff was employed by the defendant, common carrier as aforesaid in such commerce.

And this the defendant is ready to verify.

Wherefore it prays judgment if the plaintiff ought to have or maintain its aforesaid action thereof against it, etc.

CENTRAL VERMONT RAILWAY COMPANY,
By C. W. WITTERS AND
HARRY B. AMEY,
Its Attorneys.

Endorsed: Filed Mch. 11, 1913, Geo. C. Stevens, Clerk.

And by leave of the Court the foregoing Defendant's Second Plea is filed.

And the plaintiff files March 15, 1913 the Plaintiff's Replication, which is in the words following:

30 Franklin County Court, March Term, 1913.

42.

MARY THERESA WHITE
vs.
CENTRAL VT. RY. CO.

Plaintiff's Replication.

And the said plaintiff, as to the said plea of the defendant by it secondly above pleaded, saith: That the said plaintiff by reason of anything by the said defendant in that plea alleged ought not to be barred from having and maintaining her aforesaid action over against the defendant because she says:

(1) The said plaintiff's causes of action, and each and every one of them, as set forth in the plaintiff's original declaration, accrued subsequent to the taking effect of the act of Congress entitled "An Act Relating to Liability of Common Carriers by Railroads to Their Employees in Certain Cases", approved April 22, 1908.

(2) That at the time of the happening of the several things mentioned and set forth in the plaintiff's declaration the plaintiff was, and ever since has been a common carrier by railroad engaged in commerce between certain states of the United States, to wit, between the State of Vermont and the State of Massachusetts and the State of Connecticut, and between the State of Vermont and a foreign nation, to wit, the Dominion of Canada.

(3) That at the time of the happening of the several things in the plaintiff's said declaration mentioned and at the time plaintiff's intestate received the injuries complained of in her declaration, he, the said intestate, was employed by the defendant common carrier as aforesaid in such commerce.

(4) That by the laws and statutes of the United States and of the State of Vermont this Honorable Court ought, and now has, full and complete jurisdiction of the matters and things set forth in the plaintiff's declaration to see and determine according to law.

And this, she, the said plaintiff, prays may be inquired of by the country.

MARY THERESA WHITE,
By her Attorneys,
C. G. AUSTIN & SONS.

[Endorsed:] C. G. Austin & Sons, Att'ys for Pl'ff. Filed Mar. 15, 1913, Geo. C. Stevens, Clerk.

31 And the defendant files, March 31, 1913, its demurrer to the plaintiff's replication, which is in the words and figures following:

STATE OF VERMONT,
Franklin County, ss:

County Court, March Term, 1913.

MARY THERESA WHITE, Adm'r'x,
vs.
CENTRAL VERMONT RAILWAY COMPANY.

Defendant's Demurrer to Plaintiff's Replication.

Now comes the defendant by Harry B. Amey, its attorney, and defends the wrong and injury, when, etc., and for plea says that the said plaintiff's replication and the matters therein contained in manner and form as the same are therein stated and set forth are not sufficient in law to entitle the said plaintiff to the relief therein prayed for; and that the said defendant is not bound by law to answer to the same, and this the said defendant is ready to verify: Wherefore by reason of the insufficiency of the said replication the said defendant prays judgment against the said plaintiff and for its costs.

CENTRAL VERMONT RAILWAY COMPANY,
By HARRY B. AMEY, *Attorney.*

Endorsed: Filed Mch. 31, 1913, Geo. C. Stevens, Clerk.

32 And on the same day, said March 31, 1913, the defendant files its specifications of demurrer which is in the words following:

STATE OF VERMONT,
Franklin County, ss:

County Court, March Term, 1913.

MARY THERESA WHITE, Adm'r'x,
vs.
CENTRAL VERMONT RAILWAY COMPANY.

Specifications of Demurrer.

In the above entitled cause the defendant herein assigns the following causes for demurrer:—

(1) Said replication is no answer to the defendant's plea.

(2) Said replication is a complete departure from the plaintiff's writ.

(3) Said replication introduces a new cause of action not contemplated in the plaintiff's declaration.

(4) Said replication does not support or fortify said plaintiff's declaration.

(5) Said replication does not present matter of estoppel to the defendant's plea.

(6) Said replication does not traverse said plea.

33 (7) Said replication does not confess and avoid said plea.

(8) Said declaration purports to recover damages under the laws of the state of Vermont, while the replication confesses that the action should be under the Federal Employers' Liability Law.

(9) The action in the said declaration of the plaintiff is at common law, while the replication of said plaintiff dominates said action as under the Federal Employers' Liability Law.

Dated at St. Albans, in said County, this 31st day of March, 1913.

CENTRAL VERMONT RAILWAY COMPANY,
By HARRY B. AMEY, *Attorney.*

And the Court hear said demurrer and overrules the same and allow an exception to the defendant, which is ordered to lie. And afterwards on the 28th day of April, at said March Term, 1913, the defendant moves to dismiss the plaintiff's replication, which said motion is in the words following:

Motion to Dismiss.

Now comes the defendant in the above entitled cause and moves this Honorable Court to dismiss the plaintiff's replication for the following reasons:

(1) The replication is no answer to the defendant's plea.

34 (2) Said replication is a complete departure from the plaintiff's writ.

(3) Said replication introduces a new cause of action, not contemplated in the plaintiff's declaration.

(4) Said replication does not support or fortify said palintiff's declaration.

(5) Said replication does not present matter of estoppel to the defendant's plea.

(6) Said replication does not traverse said plea.

(7) Said replication does not confess and avoid said plea.

(8) The declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the federal employers' liability law.

(9) The action in the said declaration of the plaintiff is at common law, while the replication of the said plaintiff denominates said action as under the federal employers' liability Law.

And the Court overrule said motion and allow an exception to the defendant.

And on the same day the plaintiff presents the following deposition of W. E. Lamson, filed March 11, 1913:

MARY T. WHITE, Ad'm'r'x,
vs.
CENTRAL VERMONT RY. CO.

Citation.

To any Sheriff or Constable in the State, Greeting:

By the authority of the State of Vermont, you are hereby commanded to notify the Central Vermont Railway Company, defendant in the above entitled cause, to appear at the office of C.
35 G. Austin & Sons, in the city of St. Albans, County of Franklin, and State of Vermont, before Hiram P. Dee, a Justice of the Peace, to be present at the taking of the deposition of W. E. Lamson, on the 10th day of March, A. D. 1913, at ten o'clock A. M., said depositions to be used on the trial of said cause of Mary T. White, Administratrix, vs. The Central Vermont Railway Company, at the March Term of Franklin County Court, A. D. 1913.

Fail not, but service and return make according to law.

Given under my hand at the City of St. Albans, in said County of Franklin, this 3rd day of March, A. D. 1913.

HIRAM P. DEE,
Justice of the Peace.

(Endorsed:) We hereby accept service of the within citation, acknowledging receipt of copy thereof, and waive all other and more complete service of the same.

CENTRAL VERMONT RY. CO.,
By HARRY B. AMEY, *Its Attorney.*

Deposition.

I, W. E. LAMSON, of Randolph, in the County of Orange and State of Vermont, of lawful age, depose and say:

Direct Examination by Mr. AUSTIN:

Q. Where do you reside, Mr. Lamson?
A. Randolph, Vt.
Q. What is your age?
A. I am 69.
36 Q. What is your business?
A. Furniture, house furnishing goods, undertaking, carpets and crockery.
Q. Were you at home on the early morning of January 12, 1912?
A. I sure was.
Q. Were you called upon as undertaker, to go to a wreck on the C. V. Ry. Railroad, to get a body?
A. I did.
Q. About what time were you called upon?
A. Well I should say about three o'clock in the morning.

Q. Did you go to the wreck?
A. I did.
Q. At what place or point did that wreck take place on the Railroad with reference to Randolph Village?
A. Well, about a mile and a half up the line, just on the edge of Braintree.
Q. On arriving there, what did you discover or find had taken place?
A. Well, I found a bad wreck. It was all on fire. There was a caboose and two cars certain, I don't know but three, I rather think there was three cars on fire. The caboose and second car was telescoped right into the third car, you might say.
Q. Could you judge from the appearance, about the force which the rear train had when it struck the forward Train?
Objected to.
A. Why great force, of course.
37 Q. Did you there learn that somebody had been killed?
A. Yes, I did.
Q. Who?
A. Mr. White.
Q. Where did you find the body of Mr. White?
A. Right on the front of the engine, on the pilot you might say. Seemed to be crowded right up there.
Q. What was there remaining of his body, at the time you arrived there?
A. Well, just the trunk of the man. The arms were gone, and the head. It was so hot you know that they couldn't take it off for a while, and had to throw snow on it to cool it off awhile there, before we could get it off.
Q. When the body was removed, did you find anything of the legs?
A. No.
Q. What was done with the body, if you know?
A. Well they put it on a door that they had taken off somewhere, and gave it to me, and I and my man took it to my sled and took it down to my rooms, my undertaking rooms.
Q. After the body was taken to your undertaking rooms, what did you then do with it?
A. Well we cleaned it up as well as we could, and saturated it with embalming fluid, and did it all up with cloths and put in it a casket, and shipped it to St. Albans.
38 Q. About when was it shipped to St. Albans?
A. On the 12th of January, I think it went on the three o'clock train.
Q. Were you called upon on the 9th day of January, 1913, to go to the place of the wreck and show it to Mr. John Webster, a civil engineer?
A. I was.
Q. Did you go?
A. I did.
Q. Did you show Mr. Webster the exact spot where the wreck occurred?

A. I did.
Q. What kind of a night was the night of the 11th and the morning of January 12, 1912?
A. It was a very light moonlight night, very cold.
Q. Was there any wind?
A. No, I don't think so.

W. E. LAMSON.

All formalities for sealing, filing or otherwise, for the use of this deposition, are waived by the parties.

HIRAM P. DEE,
Justice of the Peace.

STATE OF VERMONT,
Franklin County, ss:

At the City of St. Albans, in the County of Franklin, this 10th day of March, A. D., 1913, personally appeared W. E. Lamson, and made oath that the foregoing deposition, by him subscribed, contains the whole truth and nothing but the truth.
Before

HIRAM P. DEE,
Justice of the Peace.

39 The above deposition is taken at the request of Mary T. White, administratrix, to be used in a cause to be heard and tried by Franklin County Court, in which cause Mary T. White, Administratrix, is plaintiff and Central Vermont Railway Company is defendant. The deponent living more than thirty miles from the place of trial is the cause of taking this deposition. and the adverse party was notified and did attend.
Certified by

HIRAM P. DEE,
Justice of the Peace.

Witness Fees.

Travel and Attendance	$7.00
Writing	2.00
Caption & Certificate	.84
Total	$9.84

Endorsed:) Mary T. White vs. Central Vermont Ry. Co., Franklin County Court, March Term, 1913. Deposition of W. E. Lamson. Filed Mch. 11, 1913, Geo. C. Stevens, Clerk. Apr. 28, 1913, opened by me, Geo. C. Stevens, Clerk. C. G. Austin & Sons, Att's for Pl'ff. C. W. Witters, Att'y for Def't.

40 And, April 29th, 1913, the defendant makes further motions to dismiss the plaintiff's action, in the following words: "A motion to dismiss the action because the body of the writ attempts allegations under the federal employers' liability law, while

the conclusion and parts relative to damages are under the statute of Vermont."

"Another motion to dismiss the action because each count in the declaration is multifarious."

"Another motion to dismiss the action because each count in the declaration is double, attempting to rely on both the federal and the state law."

And the Court overrule said motions severally and allow an exception to the defendant to the overruling of each motion. And issue is joined to the Country: and to try the issue between the parties a jury is impanneled and sworn. And at the close of all the evidence introduced both by the plaintiff and the defendant, and on the 5th day of May 1913, the defendant moves said Court to direct a verdict for the defendant; which motion is overruled and an exception allowed to the defendant. And the Court appoints M. E. Beebe, foreman of said jury.

Whereupon, after hearing the arguments of counsel as well for the plaintiff as for the defendant and the charge of the Court, the jury return into court on said 5th day of May, 1913, a verdict
41 for the plaintiff to recover of the defendant the sum of Seven Thousand One Hundred Sixty Eight Dollars, damages; which verdict is in the words and figures following:

Franklin County Court, March Term, A. D. 1913.

MARY THERESA WHITE, Adm'x of Estate of Enoch L. White.
vs.
THE CENTRAL VERMONT RAILWAY CO.

In this cause the Jury find that the Defendant is guilty, in manner and form as the Plaintiff in her declaration has alleged, and that the Plaintiff recover of the Defendant the sum of $7168 Dollars and — damages.

M. E. BEEBE, *Foreman.*

Endorsed: Filed May 5, 1913, Geo. C. Stevens, Clerk.

And afterwards on the 20th day of May, 1913, the defendant files its motion in arrest of judgment in said cause, which motion is in the words and figures following:

STATE OF VERMONT,
Franklin County, ss:

County Court, March Term, 1913.

MARY THERESA WHITE, Adm'r'x,
vs.
CENTRAL VERMONT RAILWAY COMPANY.

42 *Defendant's Motion in Arrest of Judgment.*

Now comes the defendant in the above entitled cause and makes the following motions in arrest of judgment for the plaintiff upon verdict rendered.

(1) A motion in arrest of judgment, because in the first count of the plaintiff's declaration, the plaintiff alleges that the defendant operated, managed and controlled said railroad, its engines and cars, and managed and controlled its employes in an unsafe, insecure, careless and dangerous manner, and that said defendant, then and there ran its cars and engines in a careless and imprudent manner, and the said defendant then and there employed and suffered to remain in its employ careless, incompetent and negligent men as conductors, engineers, station agents, train despatchers and telegraph operators, and the said defendant did not then and there require said conductors, engineers, station agents, train despatchers and telegraph operators to observe said rules and regulations that were then and there necessary for the safety and security of passengers, employes and freight, and the plaintiff's intestate upon said defendant's road, all of which was well known to the officers of the defendant, dangerous to the lives of the passengers, employes and freight and the plaintiff's intestate on passing over said railroad, all of which was not known to the plaintiff's intestate, but known to the defendant.

In the second count of said declaration, substantially the same allegations are made, except that, there, knowledge on the part of the defendant of the various items of negligence hereinbefore set forth, and in said second count there is no lack of knowledge on the part of the plaintiff's intestate of the various grounds of negligence and items of carelessness set up in said second count.

In the third count of said declaration there is no lack of knowledge alleged on the part of the plaintiff's intestate of the various grounds of negligence and items of carelessness on the part of the defendant making up said cause of action.

In the fourth count of said declaration there is no lack of knowledge of the various grounds of negligence and items of carelessness on the part of the plaintiff's intestate alleged.

43 (2) A motion in arrest of judgment, because the rule of damages in the declaration purports to be governed by the laws of the State of Vermont and the substance of the Vermont Statute Law now existing upon the subject of the recovery of damages. The declaration purports to be under the Federal Employers'

Liability Law. One law for substantive recovery and another law for the distribution of damages cannot stand together in the same declaration.

By the Federal Law the grand children of the deceased would receive nothing if the deceased's parents were living. By the law of Vermont, the grand children would take it all to the exclusion of parents. By the Federal Law in case there is no widow, husband, children or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont Law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased.

(3) Motion in arrest of judgment, because the plaintiff's declaration is not under the Federal Employers' Liability Law. The defendant plead the Federal Statute in bar, and the plaintiff filed a replication setting up the Federal Employers' Liability Law. This was a complete departure from the original declaration.

(4) Motion in arrest of judgment, because the verdict of the jury in this case was a general verdict, and the second, third and fourth counts of the declaration are bad because they do not allege lack of knowledge on the part of the plaintiff's intestate of the dangerous elements of the negligence on the part of the defendant which caused his fatal injuries.

(5) Motion in arrest of judgment, because this declaration purports to be under the Federal Employers' Liability Law, and contains no allegation that the defendant was engaged in interstate commerce at the time of the fatal injuries to the plaintiff's intestate, and does not allege that the plaintiff's intestate was then and there engaged in a promotion of that commerce.

CENTRAL VERMONT RAILWAY COMPANY,
By HARRY B. AMEY, *Its Attorney.*

Endorsed, Filed May 20, 1913, Geo. C. Stevens, Clerk.

44 And the Court overrule said motion and allow an exception thereto to the defendant. And the Court accept said Verdict of the Jury and render judgment thereon.

Whereupon the Court here, do consider and adjudge that the defendant is guilty in manner and form as the plaintiff in her declation has alleged and that the plaintiff recover of the deefndant the said sum of Seven Thousand One Hundred Sixty Eight Dollars, damages and her costs of suit.

To which judgment of the County Court, the defendant prays for and is allowed its exceptions. And the defendant files, June 5th, 1913 its exceptions, subject to amendment, and is allowed ninety days from the rising of court, to wit, May 24, 1913 in which to file its completed bill of exceptions, and afterwards by stipulation of counsel and orders of Court there on the time of filing the completed bill of exceptions is extended from time to time until the 29th day of September, 1913 when the defendant files its completed bill of exceptions.

W-ereupon it is ordered by said Court that execution be stayed and that said cause be passed to the next term of the Honorable Supreme Court for said County of Franklin to be held at Montpelier in the County of Washington on the first Tuesday of October, A. D. 1913.

Said bill of exceptions is in the words and figures following:

45 MARY THERESA WHITE, Adm'r'x,
vs.
CENTRAL VERMONT RAILWAY CO.,

Franklin County Court, March Term, 1913.

Defendant's Exceptions.

This was an action on the case, claimed by the plaintiff to be brought under the federal statute, to recover from the defendant for personal injuries resulting in the death of the plaintiff's intestate, Enoch L. White, on the 12th day of Jan. 1912. The defendant denies that action is under the Federal Statute. Trial by jury at the March term of Franklin County Court, 1913 Miles, J. presiding. Verdict and judgment for the plaintiff.

Before the case came on for hearing the demurrer to the replication of the plaintiff was heard and the same was overruled and exceptions allowed severally to the defendant, and thereupon a jury was impannelled. After the box had been filled and general inquiries made by plaintiff's attorney he expressed himself satisfied with the jury by saying: "We have no challenge". After that the defendant challenged three jurors, the plaintiff omitting to challenge any until after the defendant had challenged the third juryman, when the plaintiff challenged a juryman. To this challenge the defendant objected on the ground, that the plaintiff having waived a challenge without reserving a right to further challenge, was estopped from further challenge. The objection was
46 overruled and an exception allowed the defendant. The plaintiff challenged another juryman in the course of impaneling that jury, to which the defendant objected and the same ruling was made and an exception noted for the defendant.

On the trial of said cause, the plaintiff claimed and her evidence tended to show, that she was administratrix of the estate of Enoch L. White, late of St. Albans, deceased, in said county; that the defendant was a duly organized corporation, and no question was made on the trial but that at the time of the injuries complained of, it was engaged in interstate commerce between the Province of Quebec and the State of Vermont, and between the State of Vermont and the States of Massachusetts, Connecticut and Rhode Island; and that the plaintiff's intestate, at the time of the alleged injury, was employed by the defendant in such commerce, as set forth in the defendant's plea.

The plpaintiff's evidence further tended to show, that a rear end collision of defendant's extra freight trains, 401 and 708, occurred

on the 12th day of January, 1912 at 1.05 o'clock in the morning. at a place about one and one half miles North of Randolph station, on the main line of the defendant, in which the plaintiff's intestate lost his lfe.

The plaintiff's evidence further tended to show that her intestate was then there acting in the line of his duty as freight brakeman for the defendant; that he left surviving him a widow, Mary Theresa White, the plaintiff, a son, Enoch L. M. White, about eight years old, a daughter, Mary A. White, about four years old, and an unborn daughter, all of whom at the time of the trial of said cause were living, and said last mentioned child had become one year and four months old, and was named Elsie T. White.

The plaintiff's evidence further tended to show that its main line consisted of but a single track, and that on the 11th day of January 1912, at 6.12 p. m. it sent out from its station at White River Junction, destined to Roxbury, Extra 401, consisting of engine 401, a low-wheeled engine with a train of eighteen loaded freight cars, and 16 empty freight cars; that said train, 401 proceeded under an order to meet extra 336 and 415 at West Hartford, and having met said trains proceeded Northerly under an order to meet extra 403 and No. ten at South Royalton; that said 401, in obedience to said order, waited at South Royalton from 9.20 to 11 p. m., and then proceeded northerly from South Royalton to Bethel, a distance of seven miles, where it stopped to take water at 11.52 p. m.; that it left Bethel at 12.15 a. m., and proceeded to Randolph, arriving there at 12.50 a. m., where it was stopped to receive orders; that it left Randolph at 12.54 a. m., and arrived at the scene of the accident at 1.05
47 a. m.; that duirng this journey the plaintiff's intestate had no notice or warning of any kind whatever, that 708 was following.

The plaintiff's evidence further tended to show, that the defendant on the 11th day of January, aforesaid, started extra 708 out of its statioon at White River Junction destined to Roxbury, over said single track occupied by extra 401, at 10.12 p. m.; that said extra 708 consisted of engine 708 of a faster type of engine than 401 and with a train of twelve loaded freight cars and 22 empty freight cars; that said extra, 708, proceeded northerly to West Hartford, where it met extra. 403 and No. 10, and thence continued to South Royalton, arriving there at 12.08 a. m., and leaving at 12.08 a. m., and without stopping continued to Bethel, arriving there at 12.30 a. m.; that at Bethel 708 received an order and clearance card, form A, and then left Bethel at 12.36 a. m., and passed Randolph at one o'clock a. m., wthout stopping, and arrived at the scene of the accident at 1.05, that during this trip, extra 708, had no knowledge and received no notice and no warning of 401 on the track ahead of them: that the clearance card, form A, received by the conductor and engineer of 708, at Bethel, contained a blank space in which to insert the information that the next train ahead was extra 401; that it left Bethel at 12.15 a. m., and its arrival at a station northerly, and time of arrival th-reat, which clearance card contained the direction shown

therein, and said card is referred to and made a part of these exceptions.

The plaintiff's evidence further tended to show, that automatic block signals were not in service on the defendant's road, and that station block was in service; that said blank spaces provided in said clearance card were not filled out, and a dash was made in the spaces so required to be filled out; that the arrival and departure of these two trains was communicated by telegraph or telephone to the train despatcher of the defendant at St. Albans, and the defendant knew that extra 401 had left Bethel at 12.15 when extra 708 arrived at Bethel at 12.30; that 708 had been overtaking 401 so rapidly that it had made practically four hours difference in their leaving time at White River Juncton; that the defendant knew, or ought to have known, that extra 401 was between Bethel and Randolph when extra 708 was permitted to leave Bethel, and that at the rate of speed the two trains had travelled from White River Junction, that 708 was bound to overtake 401 very quickly, and unless 708 were stopped at Randolph; that the defendant knew, or ought to have known, that the station block of five minutes was not adequate protection for these two trains in the circumstances, and that the defendant provided no rules requiring the giving of orders to these two
48 trains respecting their relative positions other than the clearance card Form A, which was not filled out. That no orders were issued by the defendant to these two trains respecting each other.

That the time in question was a clear, cold, moonlight night, and the track from Randolph to the scene of the accident was slightly upgrade, and from the scene of the accident for half a mile towards Randolph, the track was straight; that under normal conditions of running an engine, the engineer of extra 708 could have seen the tail lights of 401 soon enough to have prevented the accident. That engine 708 before it left White River Junction was leaking steam from places where normally an engine does not and should not leak steam, to such an extent that the engineer could not see by the front of the engine, and required the brakeman to ride on the pilot to line up the switches in the yard at White River Juncton, because he could not otherwise see the switchlights on account of the steam.

The plaintiff's evidence tended to show, also, that said steam continued to leak from places on said engine where it was not proper for steam to escape, so that all the way from White River Junction to the scene of the accident, the engineer of 708 could not see ahead of the engine, except at such times as a draft of air might move the cloud of steam from his view, and that the steam leaked so much that one could hardly see across the cab of the engine from the fireman's seat to the engineer's seat; that engine 708 had been leaking steam from the right valve stem, which was in front of the engineer's seat and at the front end of the engine, from the 18th of December, 1910, and that every trip that the engineer of 708 took on said engine from January 5 to the date of the accident, said right valve stem leaked, and that the engine leaked improperly steam from other places thereon; that the reason why the engineer of 708 did

not see the tail-lights of 401 in time to prevent the accident was because of said steam so improperly allowed to leak from various parts of said engine.

The plaintiff's evidence also tended to show that extra trains have no schedule time, and are run only upon written orders issued by the train despatcher to the conductors and engineers, and read by them to the other members of the crews; that these orders are transmitted by telegraph or telephone to operators at stations along the line, and by them transcribed and delivered to the addressees. The plaintiff's evidence tended to show that the average speed of freight trains and the rate at which the wages of train operators are paid is ten miles an hour, and that the speed of 401 when the accident happened, was about 12 miles an hour (Transcript 79); that 401 had started from Randolph at a standstill and had been gaining momentum and speed all the way to the scene of the accident.

49 The plaintiff's evidence also further tended to show that the plaintiff's intestate was in the exercise of due care, and was performing his duty at the time and place in question; that he, the plaintiff's intestate, was not guilty of any negligence contributing to the injury; that no circumstances had arisen, no knowledge, or information or notice had come to the paintiff's intestate to cause him to alight from the train or in any other manner to protect the rear end of said train.

The plaintiff's evidence tended to show that at the time of the injury extra 401 was not stopped or delayed on the main track under circumstances in which any person on said train would have reason to believe that it might be overtaken by another train; that at the time of the injury extra 401 was traveling a little faster than the average rate of freight trains, and that during its entire trip from White River Junction to the scene of the accident, the only stops it had made were in obedience to orders for that purpose; that when said train stopped at Randolph to receive orders that the plaintiff's intestate was seen to set forth with the necessary signals back from the rear of said train to protect the train in the usual manner, and that her evidence tended to show that he fully performed his duty.

The defendant claimed and its evidence tended to show that the trains concerned in the collision which resulted in the death of the intestate were No. 401 and 708, and that both were extra freight trains; that 401 had 18 loaded cars and 16 empties, and 708 had 12 loaded and 22 empties; that 401 was a low wheeled compound and 708 was a high wheeled compound; that low wheeled engines are a slower type than the high wheel; that low wheeled engines are often used on manifest trains, that they are capable of considerable speed; that there is not much difference between their speed and that of a high wheeled engine; that low wheeled engines are built for strength, but that they get over the road very well; that steam was escaping from engine 708 on the night of the accident; that the forward brakeman on 708, who was in the cab for the greater part of the time from White River Junction to the scene of the wreck, on leaving White River Junction, had to ride on the pilot to line up the switches in the yard because of the density of the steam; that it is

more convenient to line up switches from the pilot than to stay in the cab when doing it; that it is not extraordinary for steam to come out of an engine on a cold night; that some steam would escape on such a night; that the night of the accident was very cold and that on a very cold night steam shows up more plainly, and a very little steam will show on such nights; that it is not an extraordinary situation for steam to come out from around a normal engine; that it is
50 not infrequent that steam escapes from around the piston rod; that steam also normally, comes out of an engine through the smoke stack and the escape valves; that some steam comes out of an engine every time the piston moves, and also comes out of an engine properly through the pop valves and cylinder cocks; that there are forty main line switches between White River Junction and the scene of the wreck; that all these were lighted on the night of the accident and the lights were seen by engineer McDonald from the cab of 708 on that trip before he passed over them; that if a switch is set for the main line, green color shows; that if set for the siding, red shows; that red is more easily seen than green; that switches were all open for the main line on the night of the accident; that 708 on the night of the accident was a free steaming engine; that steam obstructed the view of the engineer at times; that the safety valves would open quite often; that under ordinary circumstances the steam sometimes obscured the view when an engine is all right; that engine 708 was an A-No. 1 engine and had recently come from the shops; that an engine will run from 75,000 to 100,000 miles, and sometimes as high as 150,000 miles between shops; that 708 was equipped with the best known appliances; that on Nov. 30th, 1911 engine 708 was overhauled and was practically the same as new when it came out of the shops; that engines are not only overhauled, but when they come out of the shop the traveling engineer rides them first; that the frequency of general overhauling depends upon the work done; that more repairs are required in cold weather, and steam leaks more freely in cold weather on account of contraction; that when an engine comes in from a trip, necessary repairs are booked by the engineer over his signature in a book kept for that purpose in the locomotive foreman's office; that when repairs are made a statement to that effect is written on the opposite page by the person supervising the repairs and over the signature of the person actually making them; that it was not possible with traffic conditions as they exsted on Jan. 12, 1912 or thereabouts, on the Central Vermont Railway, to keep engines in repair so that steam would not leak; that there was no way to prevent a normal engine in a normal condition from leaking steam; that an engine might be started from a terminal without any apparent leakage, but before arriving at next terminal a leakage might appear; that engines are more liable to leak in cold weather on account of contraction; that required repairs had been made on 708 from time to time, the last on Jan. 10, prior to the accident; that the crews of each of the trains involved in this accident consisted of an engineer, fireman, conductor, brakeman and rear flagman; that F. A. Pinkston was the engineer on 401 and L. O. Gibbons the con-
51 ductor; that D. A. McDonald was the engineer on 708 and W. L. Wright was the conductor; that plaintiff's intestate

was the flagman on 401 and was an experienced man in that capacity and had always been faithful and capable in his work and understood the use of torpedoes and fuses and of other flagging utensils; that during Dec. 1911 and Jan. 1912, to the time of his fatal injuries, the deceased was a flagman on trains between St. Albans and White River Junction on the route over which he was going at the time of the injury; that during this time the traffic as heavy; that in Jan. 1912 over this route there were 486 South bound trains and 514 North bound trains; that the distance apart of stations involved in this case are as follows: from White River Junction to West Hartford, 7. 6 miles; from West Hartford to Sharon, 5.7 miles; from Sharon to South Royalton, 5 miles, from South Royalton to Royalton, 2 miles, from Royalton to Bethel, 5 miles, from Bethel to Randolph, 7.1 and from Randolph to place of accident, 1.8 miles; that train 401 left White River Junction at 6 p. m. and arrived at South Royalton at 9.20 p. m.; that it left South Royalton at 11 p. m. and arrived at Bethel at 11.52 p. m.; that it left Bethel at 12.15 a. m., and arrived at Randolph at 12.50 a. m.; that it left Randolph at 12.54 a. m. and arrived at the scene of the accident at 1.7 a. m.; that train 708 left White River Junction at 10.12 p. m. and arrived at South Royalton at 12.8 a. m.; that it left South Royalton at 12.8 a. m. and arrived at Bethel at 12.30 a. m.; that it left Bethel at 12.36 a. m. and arrived at Randolph at 1 a. m.; that it left Randolph at 1 a. m. and arrived at the scene of the accident at 1.7 a. m.; that 401 also stopped at West Hartford thirty five or forty minutes and 708 stopped at West Hartford three or four minutes; that in going from Royalton to Randolph the grade is mixed, there being some level places and some stiff grades, being up grade North from Bethel and slight grade coming North from Randolph; that the average speed of extras is 20 miles per hour, maximum 30 and minimum 15 miles per hour; that extras are all of equal rank and may pass each other on the road without orders; that no notice was given to either of these trains of the location of the other during the trip, except as follows: that conductor, Gibbons saw a message at South Royalton stating that 708 would meet 403 and 10 at West Hartford; that trains 403 and 10 were South bound, 403 being an extra and 10 a passenger train which stopped at West Hartford within its schedule; that no torpedoes of fusees were used by flagman, White, for the protection of the rear of 401 between White River Junction and the place of the accident; that just before the collision he was sitting beside the stove in the van lighting his pipe;

52 that conductor, Gibbons was in the monitor that Engineer McDonald of 708, when he came up the line that night behind 401, was not looking for the tail lights of the preceding train, that he was looking for the torpedoes and fusees, and that, if the proper signals had appeared he would have seen and heard them, being fusees and torpedoes; that torpedoes make a loud noise when exploded; that the Central Vermont Railway was operated under standard rules; that the standard rules were adopted by what is known as the American Railway Association; that these rules were adopted by railway managers and officials for the purpose of obtain-

ing a uniform system of operation in railway service and the safest method of operation; that rule 99 was a standard rule and was in force on the Central Vermont Railway at the time of the accident, and for the contents thereof the same is referred to and made a part of these exceptions; that torpedoes are made to clamp on the rail and to explode when the locomotive wheels strike them; that it is not practical for trains to be notified at stations of the location of other trains on the road going in the same direction, as it is impossible at all times to tell where they are located; that the cards of notification and the enforcement of rule 99 would lead to divided responsibilities and parties would become more negligent; that the clearance card is used in connection with rule 91, Exhibit C., and is for the purpose of keeping trains apart and requires them to be kept apart 5 minutes; that there was no non-observance of rules 103, 220, 221, 222 and 324 on the night of the accident; that there are not automatic block signals on the Central Vermont, and extras do not travel on schedule; that the plaintiff's intestate was negligent which contributed to his injury, in that he failed in not leaving torpedoes and a fusee at Randolph, even if they were moving very slow all the way from Randolph to the point of the accident, that if 401 was moving slow then intestate should have left additional fusees and if it slowed down to the point where it became dangerous, he should have got off of the train with proper signals to protect the train and placed torpedoes on the rail; that he neglected his duty in not going back a distance required by the rules at Randolph and placing torpedoes on the rail and leaving fusees burning.

At the time this case was tried the court had announced to the attorneys engaged in trial, among whom were the attorneys for the plaintiff in this case, that an omission of an attorney to exercise a challenge when it was his turn to do so, would operate simply to exhaust one challenge, and it so ruled in the drawing of the jury in this case, to which the foregoing exception was taken.

Before the deposition of W. E. Lamson was introduced
53 by the plaintiff the defendant objected to the introduction of any evidence, for the following reasons:

(*a.*) Because it cannot be determined from the declaration whether the defendant is asked to respond to an action for injuries under the statutes of the state, or whether he is asked to respond for injuries under the Federal Statutes.

(*b.*) If the plaintiff is seeking to recover under the Employers' Liability Act, there is not sufficient allegation in the plaintiff's declaration to entitle her to offer proof and subject the defendant to the payment of damages for the violation of that act, and the shortage in this regard is in no legal effect remedied by the plaintiff's replication to the defendant's plea in bar.

(*c.*) Because the allegations of the plaintiff's declaration did not state facts sufficient to constitute a cause of action against this defendant under the Act of Congress, known as the Employers' Liability Act, and to allow the plaintiff to offer proof, under her declaration, because of the facts stated in her replication to the defendant's plea in bar would work a departure from fact to fact and

from law to law, and the rights belonging to the defendant in his defense to the action as instituted would not be available to them if the cause is allowed to proceed under the so-called replication to the defendant's plea in bar.

(*d.*) Because the Employers' Liability Act of Congress in force at the time of the pretended wrongful acts complained of in the plaintiff's declaration is a plenary statute in contravention of the common law, and the facts stated in the plaintiff's declaration not being sufficient to bring this action within the provisions of this act, this court acquires no jurisdiction of the subject matter, and the plaintiff's evidence, now being offered, is not in support of any issue lawfully before this court for adjudication, under any sufficient statement of facts to constitute a cause of action under such act of Congress.

(*e.*) And further because the declaration nowhere charges that the train upon which the plaintiff's intestate was employed at the time of the accident, was engaged in interstate commerce and nowhere charges that the plaintiff's intestate was at the time of the accident engaged in a service relating to or promoting interstate commerce, but said declaration does attempt to charge the defendant with negligence in the transaction of both intrastate business as regulated by the state of Vermont, and its interstate business as regulated by the laws of Congress.

These objections were overruled, and an exception was allowed the defendant.

54 The following exceptions were taken during introduction of plaintiff's testimony.

After the defendant's demurrer was overruled and before the trial began the defendant filed motions to dismiss the action for the reasons therein stated and said motions are referred to and made a part of these exceptions.

The following questions in said deposition were allowed to be answered subject to defendant's exception on the ground that the declaration did not claim any damages for pain and suffering.

Q. Where did you find the body of Mr. White?

A. Right up in front of the engine, on the pilot, you might say seemed to be crowded right up there.

During the direct examination of L. O. Gibbons, who was conductor on 401 with which 708 collided, he was shown a paper marked "Plaintiff's C", and various questions were asked him by way of identification of the paper as a copy of a running order out of White River Junction. These questions were objected to on the ground that it had not been shown that it was the paper the witness had on the night of the accident, that the defendant had no knowledge as to its source, and that the loss of the original had not been shown. Such evidence was received subject to defendant's exception, and upon that evidence and the evidence relating to the loss of the original and search for the same, the court found that the original was lost, that plaintiff's "C" was a copy thereof, and that the witness had made all reasonable search for the same in the places where he might reasonably expect to find it, and that he was unable to find it,

and upon it so appearing to the court, plaintiff's "C" was received in evidence subject to defendant's exception upon the grounds above stated.

Substantially the same appeared with reference to plaintiff's exhibits "D" and "E", as appeared with reference to plaintiff's "C" and the same objections and rulings were made and exception taken as in the case of Exhibit "C", and the same objections were taken, rulings made and exceptions allowed, as were taken, made and allowed in relation to Exhibit "C".

During the examination of Mr. Gibbons, plaintiff offered in evidence Rule S-71, on page 98 of the Rule Book. This rule is as follows:

"On portions of the road so specified in the time-table, trains will run with the current of traffic by signals whose indications will supercede time-table superiority. The movement of trains will be supervised by the train dispatcher who will issue instructions to signal men when required."

55 Objection was made to the introduction of this rule on the ground that the rule was immaterial. Plaintiff then proceeded to state in the presence of the jury as follows: The court having asked him to state his offer, he therefore stated, after some discussion:

"We claim that this train dispatcher here at St. Albans, had information of when 401 passed South Royalton, when it passed Bethel, when it passed Randolph, and knew the position of 708 when it reached South Royalton, with reference to this train 401; that he knew the position it had gained when it reached Bethel, and that 401 didn't know it and that 708 did know it, but this man whose duty it was to operate those two trains knew it, and could see as plainly as if the objects were in a checker-board before him—that the one was overhauling the other, and he didn't notify either of the fact; that he should have stopped that train that was pursuing the other one at Bethel, and that he should have told them that 401 was on the track ahead of them, and only a few miles away; that certainly he should not have allowed them to pass Randolph—but I don't want an exception if I can avoid it."

The question was not answered.

An Exception was taken to this offer made in the presence and hearing of the jury because the plaintiff's attorney has been testifying.

The Court then told the jury as follows:

"Well, gentlemen of the jury, you should not—what was said by counsel to the court here just now, you should not consider that at all in determining any issue in this case, it was not directed to you, but to the court. An exception may be noted for the defendant."

An Exception was allowed the defendant to the remarks of plaintiff's counsel as above set forth.

The plaintiff then offered Rule 324 on page 160 of the defendant's Rule Book. The plaintiff's attorney stated as follows:

"We are going to show that at Bethel the operator had a record

of the time 401 pased there, or rather that he ought to have had a record under this rule. It was his duty to have a record of the time 401 passed there, and that he ought to have informed himself of the approach of 708 to be prepared to furnish information to 708.

That he expected to show that when 708 got its clearance card
56 at Bethel that this operator drew a dash through the space where the rule says he must tell them when 401 left that station, and knowing that that train was between Bethel and Randolph at that time and only 21 minutes away he gave him no information at all, omitting it from the clearance card."

Plaintiff was then allowed to introduce the rule as evidence against the objection and Exception of the defendant on the ground that it was entirely incompetent, irrelevant and immaterial.

Rule 324 is as follows:

"Operators are required to keep a record of the time trains pass their stations, inform themselves in regard to approaching trains, and be prepared to furnish information promptly to those that should receive it."

The witness Gibbons was asked the following questions and answers were received subject to defendant's exception that they were incompetent, irrelevant and immaterial:

Q. Did the operator at Randolph give you any information of the position of train 708?

A. No.

Q. Now, did E. L. White, this plaintiff's intestate, see that order so far as you know, that you saw addressed to 403, to meet 708 somewhere?

AMEY: Same objection. Exception by defendant.

AMEY: The question is leading.

Q. So far as you know. I will ask only for your knowledge.

A. Not as I know of.

Q. Did you tell him anything about that order?

A. I don't remember.

Against the objection and Exception of the defendant on the ground that the evidence was entirely incompetent and immaterial, the witness testified that after the trains struck he discovered the remains of Mr. White.

The death of Mr. White, plaintiff's intestate, was conceded by the defendant.

Witness testified that he received a 19 order at Bethel, and that he delivered the order to Engineer McDonald, and after making the order complete the train proceeded and that with this order there was a clearance card for McDonald delivered to him; that it did not contain on it, that is, any report of any train ahead.

57 Against the objection and Exception of the defendant on the ground that rule 221 does not apply under the circumstances of this case, the witness was allowed to answer in response to the following question:

Q. That is to say, was there any notice to you on that clearance card, according to this rule 221 and Form A, that the next train ahead was 401, and the time that it left Bethel, was that in there?

And the witness answered:

A. I don't think it was.

Rule 221 is referred to and made a part of these exceptions as is clearance card "A."

During the examination of F. J. Storms, dispatcher, who was on duty from nine o'clock p. m. January 11th and until the time of the accident and had charge of the movement of trains in the district over which 401 and 708 were running, the following exceptions were taken:

Against the objection and exception of the defendant the following question was asked:

Q. Now, Mr. Storms, when the rules of this company do not insure safety, when by following to the letter and spirit of the rules of the company, life is put in danger, what is the duty of the dispatcher?

Objection was made to this question on the ground that it was incompetent, irrelevant and immaterial, and the question was waived. Exception was taken to the asking of the question. The Court found the question was asked in good faith, but the defendant was allowed an exception.

The defendant claimed that there was no evidence introduced in safety but the plaintiff claims otherwise and the transcript is referred to for a determination of that question; and the defendant claims that there was evidence that the rules of the company in operation and governing the movement of 401 and 708 on the night of the accident were the most conducive to safety, that these rules were followed, and that by the following out of these rules there is less danger to employees than by the following out of any other method of protection, and the transcript is also referred to upon this claim.

The witness was further asked the following question:

Q. Now I will ask you about your practice what you have done as a train dispatcher of this defendant company, when you have found that the rules of the company were not adequate to protect human life—I want to know whether you have abided by those rules or whether you have departed from them as a prudent man?

58 Objection was made to this question on the ground that it was incompetent, irrelevant and immaterial and the plaintiff's attorney said he did not care to have the question answered subject to exception, and waived the question. An exception was taken to the asking of the question.

The witness was asked a further question:

Q. Mr. Storms, did you send any order to 708 regarding 401 on the night of the 11th, or morning of the 12th of January?

Against the objection and exception of the defendant on the ground that this evidence was incompetent, irrelevant and immaterial the witness was allowed to answerasfollows:

A. No sir.

And against the further objection and exception of the defendant on the ground that such evidence was incompetent, irrelevant and immaterial the witness was asked the following question:

Q. Did you send any order to 401 on that occasion with reference to 708?

The witness was allowed to answer:

A. No sir.

During the examination of Mr. William L. Wright (Plaintiff's witness) who was conductor of 708 on the night of the accident, the following exceptions were taken:

During the cross examination by the defendant the following question was asked:

Q. And supposing you were delayed on sidings and after you got back on the main line, a lot of time is lost, how do you protect your rear end?

Objection was made by the plaintiff to this question and the following discussion ensued:

COURT: That is hardly cross examination, that we think, Mr. Amey, as has been suggested, it would be proper matter of defense, but we hardly -hink it is cross examination or anything that came out in the direct examination, now you directly point to how that he should protect the rear end of his train, I am inclined to think that that is not cross examination.

Mr. AMEY: Well, inasmuch as the direct examination was attempting to bring out the fact that we were not exercising due care I thought that I had a right to ask any question that would indicate that we were.

COURT: Well, do you wish to show, as you inquired, to show that you were using due caution in protecting the rear end of the train?

Mr. AMEY: I mean the Company, I do not mean the plaintiff.

59 COURT: I am inclined to believe that this is not cross examination and I will exclude it as such, but not exclude it as not being admissible when properly offered.

Mr. AMEY: Well, I would like to make an offer.

COURT: You do not have to on cross examination, but you may make it and we will hear the offer all the same.

Mr. AMEY: I think I have stated to the Court that this witness claims there was no warning whatever between White River Junction and the scene of the accident, and I am trying to find out from him what warning should be given when the trains are in proximity.

COURT: Well that would hardly be cross examination, we will adhere to our ruling, we don't exclude the evidence in its proper time, but we simply exclude it at this time.

Exception by the defendant.

The witness on direct examination had not testified as to how the rear end of a train shall be protected in any circumstances.

In the direct examination Mr. Wright testified that he was a conductor, had been a conductor for eighteen years and had railroaded for about twenty years.

That he started out of White River Junction at 10.12, that he met passenger train No. 10 and extra 403 at West Hartford, that he was

there probably three or four minutes and then ran to Bethel, received an order at Bethel and a clearance card.

That there was no stop after leaving Bethel, that he had no notice whatever that train 401 was ahead of him, that he did not believe that he was going to meet a freight train upon the track up between Randolph and Braintree, that he was running between twenty and twenty-three miles per hour.

That he saw no tail lights of 401 at any time before he hit them, that he had no warning or notice of any kind that 401 was ahead of him, that there was a straight track above Randolph back from the scene of the wreck for about a half a mile.

He further stated that he did not encounter anything from White River Junction to the scene of the wreck that warned him of the location of the train ahead.

During the examination of D. R. Beeman the following Exceptions were taken to the admission of evidence.

Mr. Beeman was speaking of a house rented by the plaintiff's intestate from him and that he had rented it for nearly three years, after which the following question and answer appeared:

60 Q. And after renting it, did you, previous to his death, make a contract of sale of the house and property to him?

A. Yes, sir, the same house, it is the same house that they live in now, the same house they rented from me, it is a three story tenement house away down at his father and mother's farm. I think they were down there about a year and at the time of his death I had bargained with him for a house at $25 a month so that he could get him a home. I thought a great deal of him, as he being so honest with me in all his dealings, paying his rent and all that. He wanted to get a home for himself and family and I gave him the chance.

Motion was made to have the answer stricken out on the ground that it was not responsive, that it was too involved and that a part of it was immaterial. Upon the defendant being asked what part of the answer he desired to have stricken out and having answered the whole of it as not being responsive to the question, the motion was overruled and an exception was allowed the defendant.

During the examination of Mary Theresa White, wife of the intestate, the following exceptions were taken to the admission of evidence: The following question was asked by the plaintiff:

Q. Was he (meaning the deceased) a member of any church?

A. He was.

Objection was made to this and an exception taken by the defendant on the ground that the evidence was immaterial. At the time the objection was made Mr. Amey remarked that he did not care much about it. It was offered to indicate the moral training and discipline and influence in developing nurture and mortal training.

The witness was shown a paper marked "Plaintiff's Exhibit T" and she was asked what it was. She answered as follows:

A. It is to certify that he was baptized in the Methodist Episcopal church at Milton.

The witness further answered that it was a certificate of baptism. The witness further stated, in answer to a question by plaintiff's counsel, that the plaintiff's "U" was a certificate of church membership.

This evidence was all introduced against the objection and exception of the defendant on the ground that such evidence was immaterial.

Exhibits "T" and "U" were excluded by the court after having been offered by the plaintiff to show what kind of a man Mr. White was, as bearing upon nurture, care, moral training and discipline of his children.

61 *Defendant's Exceptions to Evidence Taken During the Defendant's Testimony.*

During the cross examination of L. O. Gibbons, by the plaintiff, the following exception was taken to the plaintiff's inquiry based upon a statement made in writing by the witness marked "Plaintiff's W" as tending to refresh his memory.

The witness was being interrogated with reference to a matter to which he testified in chief, as to what he and Mr. White did at Randolph with reference to that train. The objection was based upon the ground that it has not been shown to be a writing signed by the witness. The witness had said he signed it.

Exhibit "W" was not introduced in evidence. The witness was asked if he did not state in writing as follows:

"We were doing all I thought necessary and proper to do on that occasion, he was in the line of his duty as well as myself, and other men of the train, and it was not the fault on my part or the part of Mr. White that caused the collision."

The witness was further asked:

Q. Now, Mr. Gibbons, did you intend to say at that time what I have read to you here?

Obj. on the ground that it is a conclusion.

A. Yes.

Exception.

And further objections were made by the defendant that the witness interprets in that (Exhibit W) if he ever made the statement as to what constitutes a proper measure of due care under the circumstances, instead of stating the facts.

The witness had testified in direct examination that White was sitting in front of the stove in the main body of the caboose lighting his pipe when last seen by the witness after leaving Randolph. This was offered for the purpose of showing that White was acting improperly at the time of the accident. To rebut this inference to be drawn from the testimony of the witness this evidence respecting Exhibit "W" was r-ceived.

During the cross examination of D. A. McDonald the following exceptions were taken to the admission of evidence.

The witness had been testifying as to the extent of the obstruction of his view on the night of the accident on account of steam

escaping from the engine that he was driving. He testified
62 that his view was obstructed by steam for a portion of the time. This testimony had been received at a hearing of the Public Service Commission. The following question was asked:

Q. Now you have whiffled around about this question of steam several times, have you not?

The witness answered as follows:

A. I do not understand the meaning of the word "whiffle".

An exception was allowed the defendant.

The witness was then further asked:

"Whiffle" means to shift, to waver, to warble, to start out and turn and go back, to not adhere to any one position.

Objection was made to this question and to the definition of the term "whiffle" on the ground that the question was improper and immaterial.

The witness answered as follows:

A. I think not.

An exception was allowed the defendant.

The witness Maun's attention was directed specifically to rule 99 and he was asked in direct examination the following question by defendant:

Q. I will ask you what duty it imposes upon the rear flagman?

Plaintiff's attorney objected, but said if defendant claimed that 99 was ambiguous, they would waive the objection. Defendant's attorney replied that it did not so claim, wherefore the question was excluded and an exception was allowed the defendant.

The defendant claimed that he was entitled to the opinion of an expert upon the rules. The witness had qualified as an expert.

The witness had been asked a long hypothetical question and this was the continuation of it:

A. Assume, as I have previously stated in the hypothetical question, and assume further that the conductor of 708 received a 19 order and clearance card at Bethel, that the clearance card is Plaintiff's Exhibit R, which you have read, that it did not state the time when 401 left Bethel, would it still have been the duty of Flagman White to protect his train at Randolph as you have stated?

Plaintiff objected to the question because it includes in the hypothesis something that it is perfectly clear Mr. White knew nothing about, that is, he did not know that 708 had received the proper clearance card.

An exception was allowed the defendant to the statement of the plaintiff's attorney, "That it was not a proper clearance card."

(Qustion continued.)

63 Q. Did he do his duty at Randolph and from Randolph to the scene of the accident?

A. It is my opinion that he did not.

An exception was allowed the defendant to the remarks of Mr. Austin and to his comment upon the last question and answer.

During the cross-examination the following question was asked:

Q. But let's go back to the train, of course we are trying a lawsuit, my question was directed to the condition of the train. A

freight train like this 708 and 401, on January 11 and 12. Who is the judge of whether it is necessary to get off from a moving train and go back and flag?

Objection made by the defendant because the question is incompetent and immaterial.

The witness was allowed to answer as follows:

A. Well if left to the judgment he might err in judgment.

An exception was allowed the defendant.

During the further cross-examination of Mr. Maun he was asked the following question:

Q. We have in consideration in asking you this question what you have testified to in regard to the rule, and I assume in asking you the question, that you are familiar with them and I want to know who upon a moving freight train, should be the judge whether the time has come or the occasion occurred when it is necessary to get off from a moving freight train and go back and flag?

The defendant objected to this question for the following reasons:

"Rules prescribe certain conditions, existing conditions, and then prescribe that this flagman's duty is to perform certain duties; under such conditions there is no discretion left and the question as to whose duty it is to judge whether it is right or wrong to do, does not exist in this case. The rules are positive and when certain conditions exist it is then the duty of the flagman to get off and do certain things; now he has no discretion about it; he has no right to say that, I guess it is not my duty to do it, or, I guess I will wait a little while before I do it. The rules say: "You get off and put a torpedo down there." And if you do not, then you are failing in your duty and it is not a question of discretion. Assuming something that does not exist and that it is incompetent.

Against the above objection the witness was allowed to answer:

A. I should say it would be the duty of the flagman to comply with the rules.

64 An exception to the above evidence was allowed to the defendant.

Against the same objection and exception as appears in Exception 28, the following questions and answers were received:

Q. I suppose somebody on a moving freight train has a duty and a responsibility to say when the time has come or the occasion occurred when a train should be protected by a flagman at the rear, has he not?

A. Yes sir.

Q. Now who is it?

A. It is the duty of the flagman to protect his train.

Q. That does not answer the question.

Mr. AMEY: I think it is an answer to the question.

COURT: Well that did not hardly answer the question. He wants to know who decides that question.

A. Why, I can answer only that the rules decide it.

W. AUSTIN: Well, do you mean to say you don't know who has that duty on a freight train?

Mr. AMEY: I object to that. I want to see the witness treated fairly and I am bound to see that he is. He says the rules decide it and the rules are fixed and there is not any question about it at all.

COURT: Well, we will receive the answer.

A. Well, it is the duty of the flagman.

The objection made in Exception 28 covers all the above questions and answers beside the specific objection made by Mr. Amey in Exception 29.

An exception was allowed the defendant.

Q. I want to understand you now, you answered once that it was the flagman, and I want to know if you mean that. Do you mean that it is up to the flagman to decide that the time has come to get off and go back and flag?

A. I answered that it was his duty.

Q. To determine whether the circumstances have occurred and exist under which he should go back and flag, is that so?

A. I would not want to answer that he could deviate from the rules in so doing.

The above was taken subject to the same objections and exceptions as were taken in Exceptions 28 and 29.

The witness was further asked:

Q. That is what I am further asking you. I am taking in consideration all you have testified to about these rules: Now what I want to know is, you have placed certain constructions on them, do you place this construction on them, that it is the flagman's duty
65 to determine when the circumstances have occurred under which it is necessary to get off from a moving freight train and flag it?

A. It is his duty.

Q. And if he does not know these circumstances he should not get off, should he?

A. Well, it seems to me that that is rather a broad question.

The last question and answer were received subject to the objection and exception of the defendant on the ground that it is incompetent and assuming something that is not in this case in the shape of evidence.

Subject to the objection and exception of the defendant on the ground that there is no such situation as that delineated in this case and on the further ground that the question of vice-principal is not involved, the wintess was allowed to answer in response to the following question:

Q. If the vice principal of this defendant railroad company on that occasion when these two trains were still running and still behind a station at which there was an operator awake and attending to his business, knows, or has reason to know that a train is bound to overtake and run into another, if not stopped, then he should disregard rules to save human life, should he not?

A. I do not understand that that condition existed.

The court admitted the evidence as bearing on the weight to be given to the witness's judgment upon the construction of the rules.

During the cross-examination of E. E. PRESTON, defendant's witness, he was recalled for further examination and the following exceptions were taken: The witness was shown Z-5-6-7-8 and was asked if he ran 708 on the 21st day of December and if it was he that booked "pack the right valve stem", and if it was because the right valve stem was leaking? He replied:

A. Yes sir.

And he was further asked if he booked, "pack under stem joint" and if it was because it needed it? And answered:

A. Yes sir.

And also stated that when he said, "fix front by-pass head so it won't leak," that he meant so it would not leak steam? And when he said, "'flues are leaking", he meant they were leaking steam?

Z-5-7 were offered in evidence to show that certain repairs were reported necessary on this engine by Mr. Preston on the 14th-18th and 21st of December preceding the accident.

66 The plaintiff in making the offer said:

"We offer to show this leaking of steam on the 21st of December, that it was also leaking from this overpass previously,—on the 18th of December,—in other words, these engineers, both of them, have testified that when an engine was out of repair they booked it and they relied on these books to fix their memory about it and in cross-examination I have referred to these books because they referred me to them."

The question was waived and an exception was allowed to the defendant to the making of the offer because, "It has all gone to the jury from Mr. Austin."

Against the objections and exceptions of the defendant on the ground that the evidence was incompetent and immaterial, the witness was allowed to answer, in response to the following question:

Q. We will now have a look at the book, Charlie, will you tell us whether in fact and truth the engine was leaking from the right valve stem on the 21st of December, when you came in?

A. It certainly was or I should not have booked it.

This related to 708 on December 21, 1911.

Against the objection and Exception of the defendant on the ground that the evidence was incompetent, irrelevant and immaterial the witness was allowed to answer in response to the following question:

Q. On the 18th of December was she leaking from that right by-pass head?

A. She must have been or I should not have booked it.

This related to engine 708 on Dec. 18, 1911.

It appeared in evidence that the accident was on the 12th of January 1912, that the bookings described in the last two exceptions were made on the 18th and 21st of December prior to this time. The defendant's evidence tended to show that the required repairs were made.

SAMUEL KRAMER was called by the defendant as an expert on rules and on the operation of railway trains on the road. During his cross-examination he was asked the following question and the answer was received against the objection and exception of the defendant, on the ground that it was incompetent and immaterial.

Q. The C. V. Company does not operate trains by block signals, does it?

A. No, that is, as far as I know, they don't.

The defendant's evidence tended to show that rule 99 was in force where block signals were used.

Witness had been testifying with reference to rule 91 in connection with clearance card, and quoted from rule 91, and
67 further stated to the question. "Well let's see, show us where rule 91 calls for a clearance card under certain conditions," as follows: "That means a positive block from station to station, the train order signal will be used by the operator to maintain intervals required by the rule". Now your clearance card goes on to explain how this clearance card should be used; applying it in connection with rule 91, it requires that that clearance card be used for trains following each other less than five minutes apart, or if that advance train is a passenger they must make that space limit a positive block between the two stations and notify the train behind, but if there is no telegraph station beyond they will hold that train twenty minutes, they will give them a clearance card showing the time the preceding train left there, and that holds this man for twenty minutes under the rule.

After this the following discussion occurred:

Q. Now point out that.

Mr. AMEY: That question is answered. I object to pursuing it further.

COURT: This is cross-examination.

WITNESS: That requires that a clearance card be given under the circumstances——

W. AUSTIN: Just a moment, I object to another discussion.

WITNESS: Well, I can't answer your question without discussion.

W. AUSTIN: Very well.

WITNESS: If I am not allowed to explain why I do it, why I cannot do it.

Q. Can you use your finger?

Mr. AMEY: I object to that question, insulting the witness.

C. G. AUSTIN: We want an exception to this course of procedure, in the presence of the jury, charging us with insulting the witness. I think it deserves a reprimand from the court.

COURT: Well, we will allow an exception; you may proceed.

Exception by plaintiff.

Mr. AMEY: I would like an exception to the remarks of Brother Austin.

COURT: Well, an exception may be noted for both sides.

Exception by defendant.

During the cross-examination of C. M. BROOKS, operating at Randolph on January 11th and 12th, 1912, the following exceptions were taken.

During the direct examination the witness stated that he was operator there at that time and was there when 708 and 401 went by and that 401 was on the main line, remained on the main line, and left on the main line.

68 Against the objection and exception of the defendant that it was not cross-examination, the witness was asked:

Q. Now where did you first see 708?

This question was withdrawn and an exception was allowed the defendant to the asking of it.

During the cross-examination of ANDREW B. MCCARTHY, called as an expert on rules, and operation of trains, by the defendant, and examined on that subject only, the following exceptions were taken:

Against the objection and exception of the defendant on the ground that the witness' testimony in direct examination, was in that regard, with reference to the rear flagman, the witness was allowed to answer, in response to the following question:

Q. And the person or corporation who was to blame for that negligence, in your opinion, it was guilty of criminal negligence, wasn't it?

A. Yes, sir.

In direct examination the witness had testified, that White should have been in a proper position to protect his train, and failing to do so, was guilty of criminal negligence, in his opinion.

Against the objection and exception of the defendant the witness was allowed to answer in response to the following question:

Q. Then you would have this peculiar situation, would you not, of a man with a flag, or a torch out front marching along, and a man in the rear marching along, to protect both ends of this moving freight train?

A. No.

The grounds of objection are as follows:

That the question was improper in form, as assuming something that he has not appeared in this case.

Mr. PALMER: I want to object to that question, as improper in form, and assuming something that hasn't appeared in this case, and that isn't at all reasonable, and is hardly supposeable.

During the direct examination of J. E. FITZSIMONS, an expert on engines, and a master mechanic, called by the defendant, he was asked relating to 708 as follows:

Q. Can you tell the jury whether she (708) was inspected by government officials?

A. Well I cannot say if she was, positively, but if anything had been wrong——

Q. Do not tell what you do not know, Mr. Fitzsimons, but I want

you to tell the jury the necessity of Government inspection for your engines.

69 The plaintiff objected to this question and the witness was not allowed to answer. The offer is as follows:

"We would like to show that under the Federal law those engines all are frequently inspected and that this, among the others, was inspected prior to the time when it was used on this occasion and was found all right."

An exception was allowed the defendant.

Prior to this time the witness had stated that this particular engine was subject to inspection.

During the cross-examination, against the objection and exception of the defendant on the ground that it was incompetent, presenting questions that are not involved in this case, and that the question assumed something that has not been shown at all in connection with evidence as to the condition of engines, the witness was allowed to answer in response to the following question:

Q. You would not say that it was proper to run an engine which had built out around its sides a barrier that would absolutely prevent any person on that engine in the operation of it, looking ahead, of it, would you?

A. I have never seen any that way.

No such condition appeared with reference to 708, but the plaintiff's evidence tended to prove that there was a cloud of steam surrounding 708 so one could not see from the cab past the front of the engine.

Against the objection and exception of the defendant for the same reasons advanced in making objection to the last preceding question, in Exception 42, the witness was allowed to answer in response to the fol-owing question:

Q. If an engineer were able to do it, still you would not think it proper would you to run an engine blindfolded?

A. I would not.

Further during the cross examination of this witness against the objection and exception of the defendant on the ground that it assumes something that is not in this case, the witness was allowed to answer in response to the following question:

Q. Now supposing there was a tool mark on the valve stem that was big enough to tear a packing in the joint and make it leak, is it good railroading to wait until that tool mark wears off?

A. I would not.

The witness previously in direct had testified that engines were liable to leak steam when they first came out of the shop because of roughness left from the tool which would wear away in a short time.

70 Q. Now I want to call your attention to these books, (meaning Z 1-2-3-4-5-6-7-8.)

Mr. AMEY: Do you want the typewritten sheets?

Mr. W. AUSTIN: No, I want the books.

Mr. AMEY: You are suspicious.

W. AUSTIN: I am from the way you read them yesterday.

Mr. AMEY: I want to take an exception to the remarks of my brother.

An exception was allowed the defendant.

F. J. STORMS was recalled by the defendant.

With reference to the speed of freight trains he was asked as follows:

Q. What is the average speed of freight trains over your road? (meaning the C. V. road.)

Objection by plaintiff, after which a controversy arose, of which the following is a part:

COURT: Well, this was a special train, under the rules it runs according to orders. How would that have a tendency to show what you offer to show by it?

Mr. AMEY: I will confine my question to extras, what we call extras, that was an extra train.

COURT: Yes, well, I hardly think that would show that fact, I hardly think that that would have a tendency to show that, because extras are run on orders.

W. AUSTIN: And they have already shown that extras had no schedule.

COURT: Do you want that excluded subject to their exception?

W. AUSTIN: No, let it go, we have taken a lot and might as well take the rest.

COURT: Go ahead.

Mr. AMEY: I want an exception to my brother's remarks just now when he says we have taken a lot, and I suppose we have got to take the rest.

W. AUSTIN: I retract that statement.

COURT: That is talk between counsel, and, as we suggested before, it shouldn't occur, the better way is to talk with the Court.

Mr. AMEY: Well, if the Court will pardon me, I think I understand why counsel makes such remarks all through this trial.

COURT: Well, an exception may be noted, proceed.

An exception was allowed the defendant to the above remarks of the plaintiff's counsel.

Before entering upon the trial of this cause, the defendant moved to dismiss upon the grounds stated in his motions, which are hereby referred to and made a part hereof. The same were overruled and an exception allowed the defendant.

71 The defendant excepted to the charge of the court as follows, viz:

For the failure of the court to charge as requested in original requests No. 1 to 12 inclusive, and for failure to charge as requested in additional requests Nos. 1, 5, 6, 7 and 11, and the exceptions were allowed severally so far as the charge did not comply with said requests, and so far as said requests were material, and stated a correct proposition of law:

Because the court omitted to say, that if the jury found 708 defective, but that that defect was not the proximate cause of the in-

jury, then the defective condition of 708 would be eliminated from the case; to what the court said about the negligence of the defendant in following the rules, viz: that "if the jury found that the defendant followed the rules, but there was a better way, then the defendant still might be negligent; to what the court said when he said it was the plaintiff's duty to determine whether the train was making the speed required, whether the train was liable to be overtaken by ano-her -rain, upon the ground that the rules are positive about that, and there was no room left for discretion under the circumstances on the part of the plaintiff's intestate; to the construction which the court placed upon rule 99, wherein the court said, "If a train is stopped and delayed on the main line"; to what the court said about rule 99, because the rule conveys the fact that when a train is stopped on the main line it is an absolute duty under all circumstances for the flagman to protect his rear by fusees and torpedoes; to the failure of the court to charge about the contingencies of illness and loss or impairment during the period of life, and also the contingency of death prior to the time limit of expectation; to the charge of the court where it said in substance that plaintiff's intestate claims that the defendant had no right to run engine 708 in the condition it was, and if the jury so found she would be entitled to recover; and to the charge of the court that it was the plaintiff's duty to determine whether 401 was making the time and whether he would be overtaken by a following train.

After the foregoing exceptions were taken, the court made a supplemental charge, as follows:

"I have said to you, gentlemen of the jury, with reference to rule 99, that if you find that train 708 was stopped and delayed on the main track under circumstances in which it might be overtaken by another train, etc., that it was the duty of the plaintiff's intestate to get off and deposit the fusees and torpedoes for the protection of the rear of his train. Now, I used the word 'and' instead of 'or'. I should have said 'when a train stops, or is delayed on the main line', and then told you that that question was a question of fact claimed one way by the plaintiff and by the defendant the other way, they claiming that it was stopped so, and that he didn't,
72 that the intestate did not deposit the fusees, and I told you it was the duty of the defendant to make that fact out by a fair balance of evidence in order to hold the plaintiff was negligent in that particular instance."

The defendant excepted to the charge of the court, that the burden was upon the defendant to show that the plaintiff's intestate was negligent in not depositing torpedoes and fusees in rear of his train.

The charge of the court is referred to and made a part of these exceptions for the purpose of showing what the court charged in reference to the matters therein excepted to, and omissions to charge.

At the close of all the evidence the defendant moved for a verdict

and such motions are overruled severally and an exception allowed the defendant.

After the verdict and before judgment the defendant moved in arrest of judgment and such motions were overruled and judgment on the verdict rendered, to which ruling and judgment the defendant was allowed an exception.

All the pleadings in the case, the motions to dismiss, motions for verdict, requests to charge, and motions in arrest of judgment, filed in the case, or copies thereof hereto attached, the exhibits received in evidence during the trial are referred to and made a part of these exceptions. The transcript of the evidence taken on the trial is referred to for the purpose of showing the tendency of the evidence and is to control, and may be referred to on the motions for a verdict, but need not be printed, but a legible copy shall be furnished the court for its use.

These exceptions are allowed in amendment and substitution of the bill already on file and execution stayed and cause passed to Supreme Court.

WILLARD W. MILES,
Presiding Judge.

Endorsed: Filed Sept. 29, 1913. Geo. C. Stevens, Clerk. A true copy of the official reporter's transcript of the evidence taken on the trial, referred to in said exceptions, furnished the Court for its use, is hereunto annexed, pages 127 to 613 inclusive.

73 And at said the October Term of this, The Honorable Supreme Court, begun and held as last aforesaid, said cause comes up upon said exceptions, and being duly entered on the docket of this Court, the parties come by their respective attorneys, aforesaid, namely, C. G. Austin and Sons for the plaintiff and C. W. Witters, Harry B. Amey and C. S. Palmer for the defendant, and such proceedings are had that said cause is continued to the then next term of this Court to be held at Montpelier in the County of Washington on the first Tuesday of November, A. D. 1913, when the parties come by their respective attorneys aforesaid and are fully heard upon said exceptions. And said cause is held with the Court until the present January Term, begun and held at Montpelier in the County of Washington on the first Tuesday of January A. D. 1914, when the parties aforesaid come by their respective attorneys aforesaid: Whereupon said cause having been fully heard and due deliberations had, it is considered and adjudged by the Court here that said judgment of said County Court be affirmed and that the plaintiff recoverer of the defendant the said sum of Seven Thousand One Hundred Sixty Eight Dollars damages, together with the interest thereon computed at the sum of two hundred ninety five Dollars and ninety one cents and her costs taxed and allowed at the sum of One Hundred ninety nine Dollars and sixty five cents, for which sums amounting in the whole to the
74 sum of seven thousand six hundred sixty three dollars and fifty six cents, whereof plaintiff may have execution.

Docket entry order received and filed in Franklin County Clerk's office January 23, 1914.

And afterwards and on the 2nd day of February, 1914, the defendant files in the office of the Clerk of said Supreme Court of the State of Vermont for Franklin County, its assignment of errors, in said cause, which said assignment of errors is in the words and figures following:

75 The Supreme Court of Vermont.

No. 78.

MARY THERESA WHITE, Adm'r'x of the Estate of Enoch L. White, Plaintiff,

vs.

THE CENTRAL VERMONT RAILWAY COMPANY, a Corporation, Defendant.

Assignment of Errors.

Now comes the above defendant, files herein its petition for a Writ of Error and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment.

1. The Supreme Court of Vermont erred in deciding, affirming and rendering a judgment for the plaintiff on a common law declaration upon the hypothesis that it was a declaration under the Federal Employers' Liability Law enacted by the Congress of the United States.

2. The Supreme Court of Vermont erred in holding and deciding that a verdict for the plaintiff under a common law declaration interpreted by the trial court to be a declaration under the Federal Employers' Liability Law, was not in violation of the 14th amendment to the Constitution of the United States.

76 3. The Supreme Court of Vermont erred in holding and deciding that the doctrine of assumption of risk is eliminated by the Federal Employers' Liability Law enacted by the Congress of the United States.

4. The Supreme Court of Vermont erred in holding and deciding that a plea in bar of the Federal Statute of the Congress of the United States could be construed into an admission of fact to establish interstate commerce so as to make a common law declaration into a declaration under the Federal Employers' Liability Act of the Congress of the United States.

5. The Supreme Court of Vermont erred in holding and deciding that under the Federal Employers' Liability Law of the Congress of the United States under all the evidence introduced, the plaintiff did not assume the risk.

6. The Supreme Court of Vermont erred in holding and deciding

that an action under the Federal Employers' Liability Act of Congress governing as to liability joined with the Statute law of the State of Vermont relating to the distribution of damages under the same declaration, does not violate the 14th amendment to the Constitution of the United States.

7. The Supreme Court of Vermont erred in holding and deciding that under the Federal Employers' Liability Act of the Con-
77 gress of the United States the testimony of experts in railroad operation and as to the safest method of running trains on the road is of no force and value and ought to be disregarded and is not conclusive where there is no contrary evidence.

8. The Supreme Court of Vermont erred in holding and deciding that a verdict of $7168. in one single undivided sum is a valid verdict under the Federal Employers' Liability Law in favor of Mary Theresa White, Elsiet White, Enoch L. White and Mary A. White, without stating specifically the amount to be received by each.

9. The Supreme Court of Vermont erred in refusing to render judgment for the defendant on all the evidence submitted.

10. The Supreme Court of Vermont erred in holding and deciding that under the Federal Employers' Liability Act of Congress, objections to the introduction of any and all evidence could not be sustained where the suit is brought under the Federal Employers' Liability Act of Congress and the declaration is at common law, claiming a recovery for fatal injuries while the plaintiff's intestate and the defendant were both engaged in intra-state commerce.

11. The Supreme Court of Vermont erred in holding and deciding that the defendant could be deprived of its fundamental rights under the 14th amendment to the Federal Constitution by going to trial on the merits after demurrer, on the ground of departure for the reason that the declaration of the plaintiff was at common
78 law and the replication was a confession that the case was brought under the Federal Employers' Liability Law, had been overruled.

12. The Supreme Court of Vermont erred in holding and deciding that the refusal to instruct the Jury as follows: "This case is under the Federal Employers' Liability Law, but the declaration does not so state and the replication purporting to be an amendment to the declaration does not bring the matter within the purview *within* the Federal Law, hence, to render a verdict for the plaintiff under the pleadings as they now stand, would be in violation of the 14th amendment to the Federal Constitution, which forbids the taking of property without due process of law and guarantees to everyone equal protection of the laws" was not error.

13. The Supreme Court of Vermont erred in holding and deciding that it was not error for the trial Court to refuse to instruct the Jury as follows: "It has been conclusively shown that the defendant Company at the time the Plaintiff's intestate received his fatal injuries, was operating under the standard rules; that they are in universal use throughout the country; that they had been adopted after careful investigation by the best railroad experts. The evidence shows also without dispute that these rules were not observed

by the plaintiff's intestate at the time he received his fatal injury."

79 14. The Supreme Court of Vermont erred in holding and deciding that the motions in arrest of judgment made by the defendant should not be sustained. They are as follows:

(1). "A motion in arrest of judgment, because in the first count of the plaintiff's declaration, the plaintiff alleges that the defendant operated, managed and controlled said railroad, its engines and cars, and managed and controlled its employees in an unsafe, insecure, careless and dangerous manner, and that said defendant, then and there ran its cars and engines in a careless and imprudent manner, and the said defendant then and there employed and suffered to remain in its employ careless, incompetent and negligent men as conductors, engineers, station agents, train despatchers, and telegraph operators, and the said defendant did not then and there require said conductors, engineers, station agents, train despatchers and telegraph operators to observe said rules and regulations that were then and there necessary for the safety and security of passengers, employees and freight, and the plaintiff's intestate upon said defendant's road, all of which was well known to the officers of the defendant, dangerous to the lives of the passengers, employees and freight and the plaintiff's intestate on passing over said railroad, all of which was not known to the plaintiff's intestate, but known to the defendant.

"In the second count of said declaration, substantially the same allegations are made, except that, there, knowledge on the part of the defendant of the various items of negligence hereinbefore set forth, and in said second count there is no lack of knowledge on the part of the plaintiff's intestate of the various grounds of negligence and items of car-lessness set up in said second count.

"In the third count of said declaration there is no lack of knowledge alleged on the part of the plaintiff's intestate of the various grounds of negligence and items of carelessness on the part of the defendant making up said cause of action.

80 "In the fourth count of said declaration there is no lack of knowledge of the various grounds of negligence and items of carelessness on the part of the plaintiff's intestate alleged."

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(2) "A motion in arrest of judgment, because the rule of damages in the declaration purports to be governed by the laws of the State of Vermont and the substance of the Vermont Statute Law now existing upon the subject of the recovery of damages. The declaration purports to be under the Federal Employers' Liability Law. One law for substantive recovery and another law for the distribution of damages cannot stand together in the same declaration.

"By the Federal Law the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the law of Vermont, the grandchildren would take it all to the exclusion of parents. By the Federal Law in case there is no widow, husband, children or parents, the distribution would be to such of the next of

kin as were dependent. By the Vermont Law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased."

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(3). Motion in arrest of judgment, because the plaintiff's declaration is not under the Federal Employers' Liability Law. The defendant plead the Federal Statute in bar, and the plaintiff filed a replication setting up the Federal Employers' Liability Law. This was a complete departure from the original declaration.

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(4). Motion in arrest of judgment, because the verdict of the jury in this case was a general verdict, and the second, third and fourth counts of the declaration are bad because they do not allege lack of knowledge on the part of the plaintiff's intestate of the dangerous elements of the negligence on the part of the defendant which caused his fatal injuries.

81 The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(5). Motion in arrest of judgment, because this declaration purports to be under the Federal Employers' Liability Law, and contains no allegation that the defendant was engaged in interstate commerce at the time of the fatal injuries to the plaintiff's intestate, and does not allege that the plaintiff's intestate was then and there engaged in a promotion of that commerce.

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

15. The Supreme Court of Vermont erred because it in legal effect denied the defence of assumed risk to the defendant because said Court overruled a motion to instruct a verdict for the defendant on that ground for the trial court nowhere instructed the jury on the proposition of assumed risk, although requested so to do and the Supreme Court sustained this action of the trial court.

16. The Supreme Court of Vermont erred in holding and deciding that giving a verdict of the jury under the State Statute in a total sum without division was a lawful verdict when the case was tried under the Federal Employers' Liability Act of Congress and there were four beneficiaries set up in the declaration; the widow and four children; and under the Federal Employers' Liability Law the verdict would have to be apportioned by the jury among them.

82 17. The Supreme Court of Vermont erred in holding and deciding that recovery could be had under a declaration that did not set forth any dependency on the part of the beneficiaries mentioned, and in holding that a refusal by the trial court to instruct the jury that a recovery in one single gross sum could not be had, was not contrary to the meaning and terms of the Employers' Liability Act of the Congress of the United States.

18. The Supreme Court of Vermont erred in holding and deciding that no motion by defendant in arrest of judgment after verdict

of the jury of a sum of money for the plaintiff in solido, that judgment should not be arrested because the verdict was rendered under the State Statutes of Vermont and the law governing the case was the Federal Employers' Liability Law of the United States, which requires a division of damages to each dependent relative according to the degree of dependency.

19. The Supreme Court of Vermont held and decided with reference to the plaintiff's declaration as follows: "None of the counts contain averments showing that the train on which the intestate was engaged at the time of his injury was being operated in interstate or foreign commerce nor that he was then employed by the defendant in such commerce, without which character there could be no right of action under the Federal Employers' Liability Act."

83 The defendant pleaded in bar to this declaration, setting up the Federal Employers' Liability Law, and that at the time intestate received his injuries, he was employed by the defendant in interstate commerce.

The plaintiff replied to this plea confessing that both the plaintiff and the defendant were engaged in interstate commerce at the time of the plaintiff's fatality and setting forth that by the laws and statutes of the United States and of the State of Vermont that the Court has jurisdiction to determine the matter. The Court therefore erred in holding and deciding that after demurrer to replication on the ground "that the declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the Federal Employers' Liability Law had been overruled that the motion in arrest of judgment could not be available to the defendant for the reason that there was no way in which to distribute the damages.

20. The Supreme Court of Vermont erred in failing to pass in any manner whatever on the defendant's motions to dismiss the plaintiff's replication made for the following reasons:

(1). The replication is no answer to the defendant's plea.

(2). Said replication is a complete departure from the plaintiff's writ.

84 (3). Said replication introduces a new cause of action not contemplated in the plaintiff's declaration.

(4). Said replication does not support or fortify said plaintiff's declaration.

(5). Said replication does not present matter of estoppel to the defendant's plea.

(6). Said replication does not traverse such plea.

(7). Said replication does not confess and avoid said plea.

(8). The declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the Federal Employers' Liability Law.

(9). The action in said declaration of the plaintiff is at common law, while the replication of the said plaintiff denominates the action as under the Employers' Liability Law.

21. The Supreme Court of Vermont erred in holding and deciding as follows: "After verdict the defendant undertook by motion

in arrest of judgment to raise the same legal questions respecting the declaration with reference to the Federal Employers' Liability Law as were presented on the demurrer though some of the assignments were somewhat different in form, one being that the declaration purports to be under the said Federal Statute but con-
85 tains no allegations that the defendant was engaged in interstate commerce at the time of the injury to the intestate, nor that the intestate was then and there engaged in the promotion of such commerce * * *. The rule is, however, that after judgment on demurrer by solemn determination there can be no motion in arrest of judgment for any exception that might have been taken on arguing the demurrer.

22. The Supreme Court of Vermont erred in holding and deciding as follows: "Moreover that though the declaration lacks averments showing that the intestate at the time of his injury was employed by the defendant in interstate or foreign commerce, yet not only was the declaration aided in this respect by the defendant's expressley averring in defendant's plea in bar the facts omitted from the declaration and essential in order to set forth a good cause of action under the Federal Law * * * But the *mater* replied by way of departure, if it wa sa departure, a question which we do not decide would have been a sufficient answer in substance to the defendant's plea had the plaintiff pleaded it in the first instance, nd the verdict in favor of the party who made the departure cured the fault.

23. The Supreme Court of Vermont erred in holding and deciding as follows: "The only mode of taking advantage of the departure is by a demurrer and since the defendant instead of stand-
86 ing upon its demurrer took issue upon the replication containing the departure which being found against the defendant, the Court will not arrest the judgment for after such finding it necessarily appears on the whole record that the plaintiff is in law entitled to judgment."

This was error because the judgment being one in solido is void under the Federal Employer's Liability Law for the reason that damages must be apportioned by the Jury in accordance with the dependency of the relatives entitled to recover for his death.

24. The Supreme Court of Vermont erred in holding and deciding: "It follows that since by its plea in bar the defendant expressly supplied the omissions in the declaration essential to a good cause of action under the Federal Law and since issue was joined and the replication departing (defendant asserts) from the declaration accordingly, the defendant's objection to the introduction of any evidence because the declaration does not state facts sufficient to constitute a cause of action under that Law, was properly overruled."

25. The Supreme Court of Vermont erred in holding and deciding that the conductor of 708, the persuing train on the night of the collision, should be allowed to testify, "that he received a 19 order at Bethel and that he delivered the order to the engineer

of the train and after making the order complete the train
87 proceeded; that with this order he received a clearance card and a copy of the same was then given to the engineer, but it did not contain a record of any train ahead.

26. The Supreme Court of Vermont erred in holding and deciding as follows: "The Witness Wright conductor of 708 on the night in question, called as a witness by the plaintiff having testified in examination in chief that he received an order and clearance card at Bethel, that there was no stop after leaving Bethel and he had no notice whatever that train 401 was ahead of him, that he did not believe that he was going to meet a freight train between Randolph and Braintree, that he was running between 20 and 23 miles an hour, that he saw no tail lights on 401 at any time before hitting the train, that he had no warning or notice of any kind that 401 was ahead of him, that there was a straight track above Randolph back from the scene of the accident for about ½ mile." Was asked in cross examination, "and supposing you were delayed on sidings and if you got back on the main line a lot of time is lost, how did you protect your rear end," that it was not an error to exclude the question as in cross examination.

27. The Supreme Court of Vermont erred in holding and deciding as follows: The defendant offered to show by its witness one Fitzsimmons an expert on engines and a master me-
88 chanic as follows: "We would like to show that under the Federal Law those engines all are frequently inspected and that this (No. 708) among others was inspected prior to the time when it was used on this occasion and was found all right. This offer includes not only 708, but engines in no wise connected with this case. As to the latter, the evidence was not admissable, consequently the whole was properly excluded."

28. The Supreme Court of Vermont erred in holding and deciding that motions 2 and 9 for a verdict at the close of all the evidence should be overruled, the Court deciding as follows: "#2 and #9 are based upon the claimed omission of necessary averments in the declaration to entitle the plaintiff to recover under the Federal Employers' Liability Statute. In legal effect these are disposed of by our holdings on the demurrer and on the grounds considered in the motion in arrest of judgment and need not be further noticed."

Nos. 2 and 9 are as follows:

"2. Another motion for a directed verdict. Because the action purports to be brought under the Federal Employers' Liability Law, but the declaration does not so state, and the replication purporting to be an amendment to the declaration, does not bring the matter within the purview of the Federal Law. Hence, to render a verdict for the plaintiff under the pleadings as they now
89 stand would be in violation of the Fourteenth Amendment to the Federal Constitution, which forbids the taking of property without process of law and guarantees to everyone equal protection of the law."

"9. Now, another motion for a directed virdict, because the declaration purports to be under the Federal Employers' Liability Law,

while the part which relates to the damages is absolutely under the statute law of the state of Vermont, I think it is Section 2840, for the amendment to the Federal Law of April 5, 1910, shall be construed as dedicating the fund recovered to the widow and children, as specified in Section 9: Then there is discord between the provision of the Federal Law and the law of Vermont. By the Federal Law the grandchildren of the deceased would receive nothing if the deceased's parents were living; by the law of Vermont, the grandchildren will take it all to the exclusion of the parents. By the Federal Law, in case there were no widow, or husband, or children, or parents, the distribution would be to such of the next of kin as were dependent; by the Vermont law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased. So that a general recovery under this declaration would produce a fund which the Court wouldn't know how to distribute."

29. The Supreme Court of Vermont erred in overruling
90 motion- for a verdict, Nos. 4, 5 and 6 made by the defendant The decision of the Court upon these points is as follows: "The grounds of Nos. 4, 5 and 6 are that a contributory negligence by the intestate under the Federal Statute, contributory negligence by the servants, does not defeat the action. It affects the question of damages only. By Section 3 the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the Jury in proportion to the amount of negligence attributable to such employee as compared with the combined negligence of himself and the employee." Motions 4, 5 and 6 above referred to by the Court are as follows:

"4. Another motion for a directed verdict. Because on all the evidence it appears without contradiction that the proximate cause of the injury to the plaintiff's intestate was due to his failure to observe a rule of the company which was binding and which left no discretion in him under the circumstances as they existed."

"5. Another motion for a directed verdict. Because the evidence without contradiction shows that the proximate cause of the injury was the failure of the deceased brakeman, the plaintiff's intestate, to put down his torpedoes and fusees at Randolph as the rule required."

91 "6. Another motion for a directed verdict. Because the evidence shows that he was instructed and directed to protect the rear of his train by the conductor and that he failed to do this."

30. The Supreme Court of Vermont erred in refusing to grant the defendant's 10th motion for a verdict. This motion was as follows: "(Palmer) Could I add just one — and for a further reason, that the plaintiff's declaration and the theory of the Court in the trial of the cause seeks a plaintiff's recovery under the Federal Statute, and there is no evidence in the case showing that the defendant in the operation of the train in question upon which the plaintiff's intestate was killed, was engaged in interstate commerce, and an

entire absence of evidence that at the time of the accident, the plaintiff's intestate was engaged in interstate commerce, as provided and required by the Federal Act of Congress and the decisions of the Court under that Act require. (Court:) Well, the motions may be overruled, and exceptions noted severally to each motion. They are severally overruled, and exception allowed to the defendant."

31. The Supreme Court of Vermont erred in refusing to grant the defendant's 1st and 3rd motion- for a directed verdict. These motions are as follows:

92 "1. (Amey) Now comes the defendant in the above entitled cause and moved this Honorable Court to direct a verdict in its favor, because on all the evidence introduced in said cause, the plaintiff is not in law entitled to recover."

33. Another motion for a directed verdict. Because the evidence shows that the Master was free from fault, that there was nothing which the Master failed to do which became negligent on the part of the Master, which was the proximate cause of the injury, which resulted fatally."

32. With reference to motions 1 and 3 for a directed verdict for the defendant, the Supreme Court of Vermont erred in holding and deciding as follows: "Again the evidence tended to show that owing to the difference in size of the wheels engine 708 was faster than 401 and so steadily and rapidly gained upon her the night in question that with the delays of the latter, when train 708 stopped at Bethel train 401 had not reached Randolph 7.1 miles away * * * that a Railroad Company is legally bound to know and therefore in law it does know the whereabouts of all its trains. But in disposing of the case before us it is not necessary to consider this presumption for respecting the night of the collision the evidence showed that the train despatcher through reports required by the rules *to* the Company to be given him immediately by the telegraph operators at the different stations on the different lines of the time of arrival and departure of all trains, was informed

93 of the position of these two trains as they passed north from White River Junction to the place of the accident. Having such information the train despatcher knew that when train 708 left Bethel 401 was less than 7.1 miles ahead, and he must have known that as the two trains were proceeding it was inevitable that the rear train would shortly overtake the other unless steps were seasonably taken to prevent it, and being Vice Principal his knowledge in these respects was the knowledge of the defendant. * * * It cannot be said as a matter of law * * * that the defendant so dealt with the problem before it as not to expose the intestate as to perils against which he might have been guarded by the exercise of the requisite degree of care on its part.

33. The Supreme Court of Vermont erred in refusing to grant the defendant's 7th motion for a directed verdict which is in the following language: "Because the declaration states that the plaintiff's intestate was injured by a cause of injury unknown to him, that he did not know and comprehend the danger in which he was

placed at the time he received his fatal injury, while the evidence does not show that, hence the plaintiff has fallen short of the allegation in his declaration in a vital and material matter.

94 34. The Supreme Court of Vermont erred in refusing to consider and grant original request- to charge Nos. 1 to 12 inclusive and the additional requests to charge, Nos. 1, 5, 6, 7. This the Court did in the following language. "Defendant made twelve requests to charge which excepted to the charge as follows: "For the failure of the Court to charge as requested in original requests, Nos. 1 to 12 inclusive and for failure to charge as requested in additional requests Nos. 1, 5, 6, 7 and 11, and the exceptions were allowed severally so far as the charge did not comply with said requests and so far as said requests were material and stated a correct proposition of law, because the Court omitted to say, etc., particularly specifying certain omissions to charge numbers and parts of the charge given."

"These exceptions other than those particularly specified are too general for consideration."

The requests to charge which the Supreme Court of Vermont refused to consider are as follows:

(1) "This action purports to be brought under the Federal Employers' Liability Law but the essential elements necessary to bring the action within that law have not appeared in evidence nor are they apparent in any way upon the face of the record."

95 The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(2) None of the es-ential propositions for recovery or es-ential items of negligence on the part of the defendant, set out in the plaintiff's declaration, have been established.

The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(3) There was no evidence introduced in said cause to show that the defendant Company did not require its conductors, engineers, station-agents, train despatchers and telegraph operators to observe such rules and regulations as were then and there necessary for the safety of employees; nor was there any evidence introduced to show that the defendant did not suitably equip and construct its road and railroad stations at Bethel, Randolph and Braintree and did not equip its station houses, buildings and signal boards of good and sufficient quality along its line at Bethel, Randolph and Braintree; nor was any evidence introduced in said cause to show that the defendant did not operate and maintain said stations, station houses and signal boards in a sufficient and secure manner; nor was there any evidence in this case to show that the defendant did not use proper skill in the selection and employment of servants or that it did not make proper rules and regulations and require employees to observe the necessary rules in the management and running of its trains; nor was there any evidence introduced in this case to

96 show that the defendant did not execute and deliver to station agents and operators along said line proper orders and directions for the running and passing of trains thereon; for the

movement of engines, trains and cars from the despatcher's office at St. Albans. Nor was there any evidence introduced in this case to show that the defendant did not employ reasonably skilful and competent despatchers and operators to regulate and report the movement of trains; nor was there any evidence introduced in this cause to show that it has been in years the custom of this defendant to direct station agents, telegraph and telephone operators, conductors and engineers, as to the location of its trains going in the same direction along said railroad, or to inform and advise trains going along on said railroad, *or to inform and advise trains going along on said railroad* in the same direction of the location of each other; nor was there any evidence introduced in said cause to show that the defendant failed to securely construct and maintain its engines, cars and trains; nor was there any evidence introduced in said cause to indicate that said defendant carelessly and negligently operated and maintained engine 708 at the time of this accident.

The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(4). All the counts except one, in the declaration allege a lack of knowledge on the part of the plaintiff's intestate, that any
97 train was following or that his train might be in danger. This is an essential element of the declaration and must be proved; it has not been proved and, therefore, the plaintiff is not entitled to recover.

The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(5). The rule of damages in the declaration purports to be governed by the law of the State of Vermont and recites the substance of the Vermont Statute Law now existing upon the subject of recovery of damages. The declaration purports to be under the Federal Employers' Liability Law. One law for substantive recovery and another law for the distribution of damages cannot stand together in the same declaration, for by the Federal Law, the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the law of Vermont, the grandchildren would take it all, to the exclusion of the parents. By the Federal Law, in case there were no widow, or husband, grandchildren or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont law, the next of kin would receive as provided for the distribution of personal estate without regard to their dependency upon the deceased.

The Supreme Court of Vermont erred in refusing to consider and grant the above request.

98 (6). The evidence conclusively shows that the railroad company at the time of the fatal injury to the plaintiff's intestate, was operating under Standard Rules; that those rules are the most conducive to safety; that the plaintiff's intestate was killed because of a gross violation of these rules, that his sole negligence was the proximate cause of the injury,—hence the plaintiff cannot recover.

(7). The evidence shows that the Master was free from fault with reference to the care of Engine 708.

(8). This case is under the Federal Employers' Liability Law, but the declaration does not so state, and the replication purporting to be an amendment to the declaration, does not bring the matter within the purview of this Federal Law, hence to render a verdict for the plaintiff under the pleadings as they now stand would be in violation of the Fourteenth Amendment to the Federal Constitution, which forbids the taking of property without due process of law and guarantees to everyone equal protection of the laws.

The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(9). The evidence conclusively shows that engine 708 was reported to the Master for repairs; that repairs were made, hence, so far as the condition of engine 708 on the morning in which the plaintiff's intestate received his fatal injuries, the defendant
99 is free from fault.

The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(10). It has been conclusively shown that the defendant company at the time the plaintiff's intestate received his fatal injuries, was operating under the Standard Rules, that they are in universal use throughout the Country; that they have been adopted after careful investigation by the best railroad experts. The evidence shows also without dispute that these rules were not observed by the plaintiff's intestate at the time he received his fatal injury.

The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(11). When a railroad company has deliberately adopted a system of Rules, which have been made familiar to its employees and its railroad is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the Court, because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient. There is no dispute but what Rule- 99 and 91 are Standard Rules; that they were in force at the time of this accident, and the plaintiff so understood it. These rules have been established by the best railroad experts in the country, and
100 being the result of large experience of the best railroad authority from the undisputed evidence received in this case, and it having been stated without dispute that as a result of this experience, Rule- 99 and 91 are safer than notice from stations on the line of the position of trains running in the same order, it was no negligence on the part of this defendant to run its two extras as it did in this case on the night of January 11 and morning of January 12, without receiving messages at different stations between White River Junction and the scene of the accident.

(12). It was the duty of the plaintiff's intestate, under the rules in force at the time of the injury to have flagged by means of torpedoes and fusees train 708 to prevent its colliding with 401 at

Randolph and to have put out fusees at intervals between Randolph and the place of the accident. This he did not do.

* * * * * * *

(1). The amount of recovery in this case is not to be determined by the number of children of the deceased intestate, for whose fatal injuries this suit is brought.

(2). The jury should find the actual earning power of the deceased and fix for this purpose an annual income and should in estimating damages take into consideration the expectation of life which is estimated to be thirty-three years, and should also consider that this money would not if he had lived, have *have*
101 been paid at once, but would have been paid from year to year, and the last annual sum would not be paid for thirty-three years hence.

(3). Jury should take into consideration present worth of the fair annual compensation of the deceased, and should consider that an amount of money payable in thirty-three years from date or from his decease is not anywhere near of as great value as the same sum payable now.

(4). Notwithstanding the jury may find that engine 708 was leaking steam so that the engineer could not see tail lights of 401 at the time of the accident, if the proximate cause of the injury was the failure of the Flagman White properly to put out fusees and torpedoes according to the company's rules, this plaintiff cannot recover.

35. The Supreme Court of Vermont erred in refusing to consider and to grant the following motions for a directed verdict for the defendant.

(4). There was no evidence introduced in said cause to show that the defendant company did not require its conductors, engineers, station agents, train despatchers and telegraph operators to observe such rules and regulations as were then and there necessary for the safety of employees; nor was there any evidence introduced to show that the defendant did not suitably equip and construct its road and railroad stations at Bethel, Randolph and Braintree and did not equip its station houses, buildings, and signal boards of good and sufficient quality along its line at Bethel, Randolph and Braintree; nor was any evidence introduced in said cause to show that the defendant did not operate and maintain said stations, station
102 houses and signal boards in a sufficient and secure manner; nor was there any evidence in this case to show that the defendant did not use proper skill in the selection and employment of servants or that it did not make proper rules and regulations and require employees to observe the necessary rules in the management and running of its trains; nor was there any evidence introduced in this cause to show that the defendant did not execute and deliver to station agents and operators along said line proper orders and directions for the running and passing of trains thereon; for the movement of engines, trains and cars from Despatcher's office at St. Albans. Nor was there any evidence introduced in said case to show

that the defendant did not employ reasonably skilful and competent dispatchers and operators to regulate and report the movement of trains; nor was there any evidence introduced in said cause to show that it has been in years the custom of this defendant to direct station agents, telegraph and telephone operators, conductors and engineers as to the location of its trains going in the same direction along said line or to inform and advise trains going along on said railroad in the same direction of the location of each other; nor was there any evidence introduced in said cause to show that the defendant failed to securely construct and maintain its engines, cars and trains; nor was there any evidence introduced in said cause to indicate that said defendant carelesslyy and negligently operated and maintained engine 708 at the time of this accident.

(6). The rule of damages in the declaration purports to be governed by the Law of the State of Vermont and recites the substance of the Vermont Statute Law now existing upon the subject of the Recovery of Damages. The declaration purports to be under the Federal Employers' Liability Law. One law for substantive recovery and another law for the distribution of damages cannot stand together in the same declaration, for, by the Federal Law the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the Law of Vermont, the grandchildren would take it all to the exclusion of the parents. By the Federal Law, in case there were no widow, husband, children or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont Law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased.

(7). The evidence conclusively shows that the Railroad Company at the time of the fatal injury to the plaintiff's intestate, was operating under the Standard Rules; that those rules are the most conducive to safety; that the plaintiff's intestate was killed because
103 of a gross violation of these rules, that his sole negligence was the proximate cause of the injury, hence the plaintiff cannot recover."

36. The Supreme Court of Vermont erred in refusing to sustain the exceptions taken to the charge of the trial Court. These exceptions and the decision of the Supreme Court upon them appear in the following language:

The defendant's exception taken to the charge of the Court is as follows:

(1). "Because the Court omitted to say, that if the jury found 708 defective, but that that defect was not the proximate cause of the injury, then the defective condition of 708 would be eliminated from the case."

The decision of the Supreme Court of Vermont was as follows:

"This exception cannot be sustained. We have already seen that the defective condition of that engine by way of leaking steam was one of the circumstances to be considered by the jury in determining whether the defendant was guilty of negligence in not notifying train 708 concerning train 401, with such orders as might reasonably be

necessary to prevent a collision. Hence the defective condition of engine 708, though found not to be the proximate cause of the accident, would not by reason thereof necessarily be eliminated from the case."

The Supreme Court of Vermont erred in refusing to sustain the above exception.

104 The defendant's exception taken to the charge of the Court is as follows:

(2). To what the Court said, that "if the jury found that the defendant followed the rules, but there was a better way, then the defendant still might be negligent."

This exception points to the latter part of the following paragraph in the charge:

"The defendant, as well as the plaintiff, has used as evidence in this case, some of the rules of the defendant company, tending to show that the defendant was following those rules at the time of the accident, and that those rules were such as were in general use by railroads throughout the country. They have been denominated in the course of the trial as general rules. If you find such to be the fact, that would be evidence tending to show that the defendant was operating the train at the time of the accident in a prudent manner, if you find that he (it) was following those rules and adhering to them, but if the conditions were such on the occasion of this accident that a prudent man ought and would have fore-seen the accident might and probably would happen, if those rules were followed, it would be negligence on the part of the defendant to follow them if there was any reasonable way in which to operate train No. 708 for it to avoid such accident."

The decision of the Supreme Court of Vermont was as follows:

105 "With the latter part of this portion of the charge the defendant has no reason to complain. It is held in an earlier part of this opinion that rule 221 was applicable to train 708 when it stopped at Bethel and that by the requirements thereof the clearance card given to that train should have been filled in to show the time when the next train ahead (No. 401) left Bethel and that it had not yet reached Randolph. By the undisputed evidence the clearance card was not so filled in. Consequently thenceforward the defendant, in operating train 708, was not following the rules and adhering to them."

The Supreme Court of Vermont erred in refusing to sustain the above exception.

The defendant's exception taken to the charge of the Court is as follows:

(3). "To what the court said when he said it was the plaintiff's duty to determine whether the train was making the speed required, whether the train was liable to be overtaken by another train, upon the ground that the rules are positive about that, and there was no room left for discretion under the circumstances on the part of the plaintiff's intestate."

The decision of the Supreme Court of Vermont was as follows:

"One of the defendant's requests to charge was, "It was the
106 duty of the plaintiff's intestate, under the rules in force at the time of the injury to have flagged by means of torpedoes and fusees train 708 to prevent its colliding with 401 at Randolph and to have put out fusees at intervals between Randolph and the place of the accident. This he did not do." In charging upon this subject the court told the jury they were to determine what the duty of the intestate was for the protection of train 401, and this duty, as claimed by the defendant, was largely to be gathered from its rules. The court proceeding:

"Rule 36 provides as follows: 'A red or yellow fusee, as the case may require, will be used for protection of a train which is not making the speed required by schedule or train order, and is liable to be overtaken by a following train'. We construe that rule to mean that it was the duty of the plaintiff's intestate, as rear brakeman of that train, to put out a fusee when certain conditions existed, and the rule being a command to him, that it was his duty to determine that question, that is, it was his duty to determine whether train 401 was making the speed required by the train order, as there was no schedule time, and that also he was to determine whether it was liable to be overtaken by a following train. If the train was not making the speed required by the train order, and that train was
107 liable to be overtaken by a following train, and he as a careful and prudent man ought to have known that, then it was his duty to put out fusees between Randolph and the place of the accident, but before he was called upon to do this, these conditions must have existed, that the train was not making the speed required by the train order and that he, as a prudent and careful man, knew or ought to have know that the train was liable to be overtaken by a following train."

"The effect of this charge was to place the responsibility of protecting the rear end of train 401 upon the intestate, if the train was not making the speed required by the order and was liable to be overtaken by a following train. So far the charge was in substantial compliance with defendant's request, and no exception was taken thereto. The further charge in connection therewith that the determination of whether such conditions as to speed of the train and liability of being overtaken by a following train as by the rule to require such protection, was with the intestate upon what he as a careful and prudent man knew or ought to have known, was but the legal consequence of the preceding part of the charge in accordance with defendant's request and not excepted to. The care and prudence of a careful and prudent man in like circumstances has so
108 often been laid down as the rule of diligence required, that citation of authorities is unnecessary. It necessarily follows that with the latter part of *of* the charge thus given the defendant can have no reasonable ground of complaint."

The Supreme Court of Vermont erred in refusing to sustain the above exception.

The defendant's exceptions taken to the charge of the court is as follows:

(4.) "To the construction which the court placed upon rule 99, wherein the court said 'If a train is stopped and delayed on the main line," and "to what the court said about rule 99, because the rule conveys the fact that when a train is stopped on the main line it is an absolute duty under all circumstances for the flagman to protect his rear by fusees and torpedoes."

The decision of the Supreme Court of Vermont was as follows:

"Following the taking of these exceptions, the court gave a supplemental charge on the same subject, to which no exception was saved, thus curing the defect, if any there was, in the original charge."

The Supreme Court of Vermont erred in refusing to sustain the above exception.

The defendant's exceptions taken to the charge of the Court is as follows:

"To the charge of the court where it said in substance that
109 plaintiff's intestate claims that the defendant had no right to run engine 708 in the condition it was, if the jury so found she would be entitled to recover."

The decision of the Supreme Court of Vermont was as follows:

"The part of the charge to which this refers was:

"The plaintiff claims that her intestate did all on that occasion that his duties under the rules and under his employment required, but that because of the negligence of the defendant, as claimed by her, this accident occurred and her intestate lost his life. She claims that although you (the jury) might find that the defendant was following these rules on the occasion in question, that because of the condition of engine 708, the defendant had no right to run train No. 708, as it did run it, and that it had no right to follow those rules in view of the condition of engine No. 708 leaking steam as she claims it did. If she has made out those claims by a fair balance of the evidence, and the claims which she makes before you, then she is entitled to recover although — may find that her intestate was also negligent and that that negligence contributed to his death."

It is said in defendant's brief that there was no further charge with reference to proximate and remote cause. Considering
110 this part of the charge, as it should be, in connection with what the Court had already instructed the jury, it is not subject to the criticism made. The Court had previously charged that in order for the plaintiff to recover, not only must she establish that the defendant was negligent, but she must also establish that that negligence proximately contributed to the death of her intestate, or was the proximate cause of it; that the burden was upon her to make out a cause of action against the defendant; that "She claims that the defendant was negligent in the operation of train drawn by engine No. 708" etc.; that it was the duty which the defendant owed to the intestate and all the other employees on train 401, to operate train 708 in a careful and prudent manner, as it would have been managed by a careful and prudent man, so as not to do injury to its servants on train 401; that it was not enough to prove that the

accident happened, but the question for the jury to determine was whether the defendant was negligent, and whether that negligence proximately contributed to the death of the intestate, or was the proximate cause of it. Then follows:

"The plaintiff claims that the negligence of the defendant, which caused the death of her intestate, was the running of train No. 708 with its defective engine; that it never should have run that
111 train from the station at White River Junction; that it was negligent in that it did not give such warning to train No. 708 and train 401 as it ought to have given in the circumstances of the case, in consideration of the condition of engine No. 708; that engine No. 708 was not in proper condition and was not suitably and properly equipped, and to recover in this suit, she must make out this negligence which she claims."

"In giving the part of the charge complained of, it was not necessary for the court to repeat in detail all the elements it had before stated as necessary for the plaintiff to establish in order to entitle her to recover, and particularly so, since the negligence claimed by the plaintiff regarding the defective condition of engine 708, and the running of her in such defective condition, was alluded to by the Court in connection therewith. There is not the slightest ground for doubt that the Court intended that the portion of the charge of which complaint is here made, should be considered in connection with that which had gone before, as above indicated, nor is there any doubt that the jury so understood it. The exception is not sustained." The Supreme Court of Vermont erred in rendering the decision last above quoted.

The defendant's exception taken to the charge of the Court
112 is as follows:

(6.) "To the failure of the Court to charge about the contingencies of illness and loss or impairment during the period of life, and also the contingency of death prior to the time limit of expectation.

The decision of the Supreme Court of Vermont was as follows:

"Evidence was introduced showing the intestate's age at death, his previous condition of health, his habits, earning capacity, etc., together with the expectancy of life of a man of his age, according to the American Experience Table of Mortality. On the question of damage the Court charged, among other things, as follows: "In determining what he, (intestate) is worth to the family, you should consider his actual earning power, and you should take into consideration his power to earn for the length of time that — may be expected to live," etc., Thus under the charge the jury were to consider the intestate's earning power during the term of life expectancy, which consideration involved the probabilities as to his health and physical condition. We think the charge was sufficiently explicit in this respect." The Supreme Court of Vermont erred in rendering the decision last above quoted.

The defendant's exception taken to the charge of the Court is as follows:

(7) "To the charge that the burden was on the defendant to

show that the intestate was negligent in not depositing torpedoes and fusees in rear of his train."

The decision of the Supreme Court of Vermont was as follows:

113 "The portion of the charge here challenged was in effect that on the question of the intestate's contributory negligence the burden of proof is with the defendant. It is said by defendant that under our holdings it devolved upon the plaintiff to show the intestate free from fault. There can be no question but that the rule in this State in actions for negligence based upon State law is as stated by the defendant. This case, however, is brought upon an Act of Congress regulating the liability of employers engaged in interstate or foreign commerce for injuries received by their employees while engaged in such commerce, and it supersedes the laws of the State in so far as the latter cover the same field. Consequently the question of the burden of proof respecting contributory negligence on the part of the injured employees is to be determined according to the provisions of that Act, and the declaration of the Supreme Court of the United States thereon controls." The Supreme Court of Vermont erred in rendering the decision last above quoted.

For which errors the defendant the Central Vermont Railway Company prays that the said judgment of the Supreme Court of Vermont, dated Jan. 21, 1914, be reversed and a judgment rendered in favor of the defendant Company and for its costs.

C. W. WITTERS,
Attorney for the Central Vermont Railway Company.

114 Endorsed: Mary Theresa White, Adm'r'x Estate of Enoch L. White, vs. Central Vermont Railway Co., defendant's Assignment of Errors. Filed Feb. 2, 1914. Geo. C. Stevens, Clerk of the Supreme Court of Vermont for the County of Franklin.

115 And afterwards on said 2nd day of February, 1914, said Central Vermont Railway Company, defendant, Plaintiff in Error filed in the office of the clerk of said Supreme Court of the State of Vermont for Franklin County its petition for a Writ of Error in said cause, with the order allowing the same signed by the Hon. George M. Powers, Chief Justice of the Supreme Court of the State of Vermont; which said Petition for a Writ of Error is in the words and figures following:

116 *Petition for Writ of Error.*

Supreme Court of Vermont.

No. —.

MARY THERESA WHITE, Adm'r'x of the Estate of Enoch L. White, Plaintiff,

vs.

THE CENTRAL VERMONT RAILWAY CO., a Corporation, Defendant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering a judgment against it in the above entitled case, the defendant hereby prays a writ of error, from the said decision and judgment, to the U. S. Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

C. W. WITTERS,
Attorney for Defendant.

STATE OF VERMONT,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by The Central Vermont Railway Company to Mary Theresa White, Adm'r'x of the Estate of Enoch L. White in the sum of Twelve Thousand Dollars; such bond when approved to act as a supersedeas.

Dated January 31, 1914.

[SEAL.] GEORGE M. POWERS,
Chief Justice of the Supreme Court of Vermont.

117 Endorsed: Mary Theresa White, Adm'r'x Estate of Enoch L. White, vs. Central Vermont Railway Company. Petition for Writ of Error. Filed Feb. 2, 1914. Geo. C. Stevens, Clerk of the Supreme Court of Vermont for the County of Franklin.

And afterwards on said 2nd day of February, 1914, said defendant, plaintiff in error, filed in the office of the clerk of said Supreme Court of the State of Vermont for Franklin County, in said cause his bond, duly approved by the Hon. George M. Powers, Chief Justice of the Supreme Court of the State of Vermont, which bond is in the words and figures following:

118 *Bond.*

THE CENTRAL VERMONT RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

MARY THERESA WHITE, Adm'r'x of the Estate of Enoch L. White, Defendant in Error.

Bond.

Know all men by these Presents, That we, The Central Vermont Railway Company as principal and E. C. Smith and C. W. Witters, as sureties, are held and firmly bound unto Mary Theresa White, Adm'r'x of the estate of Enoch L. White, of St. Albans, Franklin County, Vermont, in the sum of Twelve Thousand Dollars to be paid to said Mary Theresa White, Adm'r'x as aforesaid, to which payment, well and truly to be made, we bind ourselves, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 29th day of January, 1914.

Whereas the above-named plaintiff in error seeks to prosecute its writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Vermont.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of
119 error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE CENTRAL VERMONT RAILWAY COMPANY,

[SEAL.] By E. C. SMITH, *President.* [SEAL.]

E. C. SMITH, *Surety.* [L. S.]

C. W. WITTERS. [L. S.]

Attest:

W. H. CHAFFEE, *Clerk.*

STATE OF VERMONT,
Franklin County, ss:

E. C. Smith and C. W. Witters being each duly sworn, on oath depose and say; We are each of lawful age and are citizens of the State of Vermont, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Twenty Four Thousand Dollars over and above all debts, liabilities and exemptions

E. C. SMITH.
C. W. WITTERS.

Subscribed and sworn to before me this 29th day of January, 1914.

[SEAL.] W. H. CHAFFEE,
Notary Public, Franklin County, Vermont.

My commission expires Nov. 30, 1914.

Bond approved, and to operate as a supersedeas.
Dated January 31, 1914.

GEORGE M. POWERS,
Chief Justice Supreme Court of Vermont.

Endorsed: Central Vermont Railway Co., Plaintiff in Error, vs. Mary Theresa White, Adm'r'x Estate of Enoch L. White, Defendant in Error. Bond. Filed Feb. 2, 1914, Geo. C. Stevens, Clerk of the Supreme Court of Vermont for the County of Franklin.

120 And on the 3rd day of February, 1914, a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Vermont was duly issued in said cause, having been allowed by the Hon. George M. Powers, Chief Justice of the Supreme Court of the State of Vermont and was filed in the office of the Clerk of said Court for the County of Franklin aforesaid on the 9th day of February, 1914, with two copies thereof; and on said 9th day of February, a copy of said writ of error, duly certified, was by me, Geo. C. Stevens, clerk of said Court, delivered to Chauncey G. Austin, Esq., one of the attorneys of record of said Mary Theresa White, administratrix of the Estate of Enoch L. White, for said defendant in error. And on the 26th day of February, 1914, a citation was duly issued in said cause, signed by the Hon. George M. Powers, Chief Justice of the Supreme Court of the State of Vermont and filed in the office of Clerk of said Court for Franklin County aforesaid on said 26th day of February, 1914, with a deputation to G. C. Holmes to make service of said citation, which said citation was returned to the office of the Clerk of said Court with an affidavit of service in writing thereon, on the 28th day of February, 1914. Said original Writ of Error, Citation, Deputation, and affidavit of service are hereto first above annexed.

121 And afterward on the 2nd day of March, 1914, the Plaintiff in Error filed its præcippe with an acceptance of service thereon; and on the same day the præcipe of the defendant in error with an acceptance of service thereon, and the stipulation of the parties providing for an extension of time for filing the Transcript of Record in said cause with the Clerk of the United States Supreme Court, to and including March 12, 1914, and also the affidavit of the Clerk of said Supreme Court for Franklin County, and an order extending the time of filing said transcript, in accordance with said stipulation and affidavit, signed by the Hon. George M. Powers, Chief Justice of the Supreme Court of the State of Vermont, of Vermont, as filed in said cause. And præcipe of the plaintiff in error and præcipe of the defendant in error, together with said stipulation, affidavit and order for extension of time for filing said transcript are hereto next attached.

122 UNITED STATES OF AMERICA, ss:

CENTRAL VERMONT RAILWAY CO., a Corporation, Plaintiff in Error,
vs.
MARY THERESA WHITE, Admrx. of the Estate of Enoch L. White, Defendant in Error.

Proceedings in Error from the Supreme Court of the United States to the Supreme Court of the State of Vermont.

In the above entitled cause, notice is hereby given to and served upon the defendant in error, that the plaintiff in error will require and does hereby require the entire transcript of evidence and proceedings in the trial court and in the Supreme Court of the State of Vermont, excepting therefrom the motions for a verdict filed with the Clerk as appears upon pages 443 and 444 of the original transcript of evidence and proceedings taken by the official stenographer in the trial court of the State of Vermont, to be incorporated into the transcript of the record to be made and forwarded to the Supreme Court of the United States by the Clerk of the Supreme Court of the State of Vermont, for the County of Franklin, on said writ of error.

Dated at St. Albans, in the County of Franklin, and State of Vermont, this 2nd day of March, 1914.

CENTRAL VERMONT RAILWAY COMPANY,
By HARRY B. AMEY, *Attorney.*

At the City of St. Albans, in said County of Franklin, this 2nd day of March, 1914, I do hereby acknowledge service of a copy of the præcipe of the plaintiff in error above set forth, and waive any further or more formal service thereof.

MARY THERESA WHITE,
Adm'r'x of the Estate of Enoch L. White,
Defendant in Error,
By Her Attorney, WARREN R. AUSTIN.

[Endorsed:] Filed Mar. 2, 1914. Geo. C. Stevens, clerk of the Supreme Court of Vermont for Franklin County.

123 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CENTRAL VERMONT RAILWAY CO., a Corporation, Plaintiff in Error,
vs.
MARY THERESA WHITE, Admrx. of the Estate of Enoch L. White, Defendant in Error.

Writ of Error to Supreme Court of the State of Vermont.

Præcipe of Defendant in Error.

And now, within ten days, after service of the præcipe of plaintiff in error in the above entitled cause, comes the defendant in error, and indicates that he does not desire any additional portion of the record in the lower court to be incorporated into the record to be transmitted to the Supreme Court of the United States on said writ of error.

Dated at the City of St. Albans, Vermont, this 2nd day of March, 1914.

MARY THERESA WHITE,
Adm'r'x of the Estate of Enoch L. White,
Defendant in Error,
By Her Attorney, WARREN R. AUSTIN.

At the City of St. Albans, in said County of Franklin, this 2nd day of March, 1914, I do hereby acknowledge service of a copy of the præcipe of the defendant in error above set forth, and waive any further or more formal service thereof.

CENTRAL VERMONT RAILWAY COMPANY, *Plaintiff in Error,*
By HARRY B. AMEY, *its Attorney.*

[Endorsed:] Filed Mar. 2, 1914. Geo. C. Stevens, clerk of the Supreme Court of Vermont for Franklin County.

124 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CENTRAL VERMONT RAILWAY CO., a Corporation, Plaintiff in Error,
vs.
MARY THERESA WHITE, Admrx. of the Estate of Enoch L. White, Defendant in Error.

Writ of Error to Supreme Court of the State of Vermont.

Stipulation.

It is hereby stipulated and agreed that the time limited for docketing the above entitled case, and filing the record thereof with the

Clerk of the Supreme Court of the United States, is hereby extended to and including March 12, 1914.

Dated at the City of St. Albans, in the County of Franklin, and State of Vermont, this 2nd day of March, 1914.

CENTRAL VERMONT RAILWAY COMPANY, *Plaintiff in Error,*

By Its Attorney, HARRY B. AMEY.

MARY THERESA WHITE, *Adm'r'x of the Estate of Enoch L. White, Defendant in Error.*

By Her Attorney, WARREN R. AUSTIN.

Ordered, on consideration of the foregoing stipulation and affidavit by the Clerk of the Supreme Court of the State of Vermont, and for good cause shown, that the time for docketing the above entitled case, and filing the record thereof with the Clerk of the Supreme Court of the United States, is hereby extended to and including March 12, 1914.

Dated at Morrisville, Vt., this 2nd day of March, 1914.

[Seal Supreme Court, State of Vermont.]

GEORGE M. POWERS, *Chief Justice of the Supreme Court of Vermont.*

[Endorsed:] Filed M'ch 2, 1914. Geo. C. Stevens, clerk of the Supreme Court of Vermont for Franklin County.

125 Supreme Court of the United States.

CENTRAL VERMONT RAILWAY COMPANY, Plaintiff in Error,
vs.
MARY THERESA WHITE, Admrx. Estate of Enoch L. White.

Writ of Error, Supreme Court of the State of Vermont.

I, Geo. C. Stevens, Clerk of the Supreme Court of the State of Vermont, for Franklin County, on oath depose and say: that in the above entitled cause the præcipe of defendant in error and of the plaintiff in error relating to the record to be transmitted to the Supreme Court of the United States, with a Stipulation of the parties relating thereto has this day been filed in my office and that more time will be required for me to prepare, verify, page and index said record in accordance therewith in time to transmit the same to said Supreme Court and I hereby request an extension of time to and including the 12th day of March in which to complete and transmit and deposit said record, in the U. S. Supreme Court.

GEO. C. STEVENS, *Clerk.*

Subscribed and sworn to before me this 2nd day of March, 1914.

[Seal Supreme Court, State of Vermont.]

HARRY B. AMEY, *Master in Chancery.*

125½ *Certified Copy of Official Stenographer's Transcript of Trial in County Court.*

(Referred to in Defendant's Exceptions.)

126 STATE OF VERMONT,
Franklin County, ss:

I, George C. Stevens, Clerk of the County of Franklin, aforesaid, and clerk of the Supreme Court of the State of Vermont for said County of Franklin, the same being a Court of Record, and having a Seal, hereto attached, do hereby certify, that the following pages 127 to 613 inclusive contain a true and correct copy of the verbatim transcript of the official steno-raphic reporter of the evidence and proceedings in the trial Court, referred to in the Defendant's Exceptions, required by the plaintiff in error, by its præcipe, to be incorporated in the foregoing transcript of record, excepting original pages 443 & 444, omitted as required by said præcipe, as examined and compared by me as the same remains on file in the office of said Clerk.

Witness my hand and the seal of said Court at the City of St. Albans in said County of Franklin, this 7th day of March, A. D. 1914

[Seal Supreme Court, State of Vermont.]

GEO. C. STEVENS, *Clerk.*

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130 April 28, 1913, 2 P. M.

Defendant's Demurrer to Plaintiff's Replication filed.

Exceptions to the filing of the demurrer on the ground that it was out of time allowed to the plaintiff.

Exceptions by plaintiff.

Demurrer overruled and exception noted for the defendant.

Exception by defendant.

(AMEY:) Is the demurrer ordered to lie?

(COURT:) Yes, if you think there is any benefit in it, it may be ordered to lie.

(AMEY:) Yes.

"Defendant's Demurrer to Plaintiff's Replication.
(Copy of Demurrer.)

Now comes the defendant by Harry B. Amey, its attorney, and defends the wrong and injury, when etc. and for plea says that the said plaintiff's replication and the matters therein contained in manner and form as the same are therein stated and set forth are not sufficient in law to entitle the said plaintiff to the relief therein prayed for, and that the said defendant is not bound by law to answer to the same, and this the said defendant is ready to verify.

Wherefore, by reason of the insufficiency of the said replication the said defendant prays judgment against the said plaintiff and for its costs.

CENTRAL VERMONT RAILWAY COMPANY,
By HARRY B. AMEY, *Attorney.*"

131 (Following is a copy of the Specifications of Demurrer.)

Specifications of Demurrer.

In the above entitled cause the defendant herein assigns the following causes of demurrer:

(1) Said replication is no answer to the defendant's plea.

(2) Said replication is a complete departure from the plaintiff's writ.

(3) Said replication introduces a new cause of action not contemplated in the plaintiff's declaration.

(4) Said replication does not support or fortify said plaintiff's declaration.

(5) Said replication does not present matter of estoppel to the defendant's plea.

(6) Said replication does not traverse said plea.

(7) Said replication does not confess and avoid said plea.

(8) Said declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the federal employers' liability law.

(9) The action in the said declaration of the plaintiff is at common law, while the replication of said plaintiff denominates said action as under the federal employers' liability law."

132 (AMEY:) I have a motion to dismiss which goes to the very substance of the action, and I think that is already filed.

(C. G. AUSTIN:) If it is filed it is the first we ever heard of it. Never have had a copy.

(COURT:) We will allow it to be filed and we will make the same ruling on this that we did on the other. Motion overruled.

(Defendant's Counsel hand copies to Pl'ff's counsel.)

(COURT:) The declaration in this case, as I understand it, is substantially like the other declaration.

(W. AUSTIN:) No, your Honor. It is quite different. There are several counts in this declaration, the last count is probably the most comprehensive and includes the several alleged wrongs. One of the charges is that the defendant ran a fast freight too close behind a slow freight, and that it violated its duty to warn by not giving either train any order on the other train, and by not notifying either train of the close proximity of the other train. And concurring with that alleged negligence is the allegation that the following train, the pursuing train was improperly equipped, that it didn't have a sufficient engine, that the engine leaked so badly that the engineer could not see by the engine, and that they permitted this train with full knowledge of this leaky condition to pass the station
133 at Randolph when the train ahead had not arrived at the next station, in fact had not got out of sight of the station at Randolph; and it alleges that improper orders were given, no sufficient orders were given; and that no proper rules for the running of two extra freight trains going in the same direction are promulgated by this defendant, no rules which the crews of the several trains are commanded to follow that are sufficient to protect one train against the other.

Again, this ground of negligence is charged, that they did not keep the track clear, that it was a single track, and that they ran the second train over the piece of track that was occupied by the first train—they violated the duty to keep the track free from obstacles.

There are several other allegations involving the question of fixed signals. There is the allegation that they didn't have a proper and sufficient fixed signal at the station at Randolph, and that they didn't employ competent servants there to transmit orders and directions and to operate signals for the proper regulation of these trains.

I am not certain that I have recalled all the charges in the declaration. It is rather long. If the Court likes I would read it. In the main those are the charges that I now remember.

(COURT:) And the plea is substantially the same as the pleading in the other? (Referring to Niles case).

134 (AMEY:) Why, yes. We pleaded the federal statute in bar and then the plaintiff amended by setting up the federal employers' liability law and we demurred. Now, I understand the demurrer is overruled and exception taken and ordered to lie. Now I desire to make one or two more motions in order that I may get the matter properly on the record.

(W. AUSTIN:) Bro. Amey hasn't remembered that the same way

that we have. We did not reply as suggested by him—we merely admitted his plea to be true. This declaration contains the direct allegations that the defendant was engaged in interstate commerce and relies—this declaration relies upon the federal act. Every count contains an allegation similar to this which I am reading from the first count: "and they were then and there common carriers by railroad, and as such they were then and there engaged, and in connection with certain other railroads connected therewith, in commerce between several states and the Province of Quebec, and subject to the laws of the State of Vermont, and subject to and according to the laws of the United States enacted and covering the said purpose." The federal statute is set up in the declaration in every count.

(AMEY:) Well, we maintain that it isn't. Of course we don't dispute what my brother has quoted there, but we do say that there isn't sufficient in it to bring the declaration within the
135 amended federal employers' liability law. Of course if we are wrong——

(COURT:) You just let me see the declaration, Mr. Austin.

(W. AUSTIN:) Let me get on the record this claim: By their plea they waived any objection of that character. They admitted, and their admission isn't a mere admission, it is a judicial admission that this prosecution is under the federal law and that both the defendant and the plaintiff's intestate were engaged in interstate commerce. We accept that admission, we do in haec verba by our replication, and we relied upon it.

(AMEY:) My brother and I don't agree about that. We haven't made any admission, but we pleaded the federal employers' liability law in bar, because we said that that declaration is not a declaration under the federal employers' liability law; that the action could only be propertly brought under that law, and hence we filed that plea in bar, And then, if it should turn out on the presentation of evidence that interstate commerce was involved the action would have to be dismissed according to our contention. We may be wrong about it.

(COURT:) Why dismissed.

(AMEY:) Why, for the reason that there isn't enough in their declaration to bring it within the purview of the amended statute, and the conclusion of each one of the counts in the declara-
136 tion is a conclusion under our statute, the statute of Vermont which fixes the distribution of damages, while under the federal law the damages are distributed in a different way and under a different rule.

(COURT:) This is a pretty clear statement, it seems to me, that it is a suit against a corporation engaged in interstate commerce.

(AMEY:) Yes. But here is the point, if your Honor will pardon me just a moment—the fact that the road is an interstate road doesn't make this interstate commerce. The fact that there are sometimes trains, interstate trains running over that road does not bring this action, this particular action within the purview of the interstate commerce law, for in order to have the interstate commerce

law apply two things must concur at the very time of the accident—the defendant must be engaged in interstate commerce and the plaintiff must be engaged in promoting that commerce. Your Honor will recollect that the first act was declared unconstitutional because it did not discriminate in that respect. The Court said that the law did not satisfy the constitution for the reason that it didn't discriminate properly between intrastate and interstate commerce, and the Court said that the only control that congress would have over it would be when the plaintiff and defendant were both
137 participating in an interstate transaction at the time.

Now according to my view of a declaration under a statute—I may be wrong, my brothers may be entirely right about it—that sort of thing would have to be set up, because enough would have to be set up so that upon an inspection of the document of the writ the court would understand that it is within the amended act which was declared afterwards by the Supreme Court to be unconstitutional.

(COURT:) Well, a portion of this, I think, is taken right from a form in a case that was tried in the Supreme Court of the United States, and the Supreme Court held that to be sufficient.

(AMEY:) There may be some portions of it.

COURT:) As I remember it—as I remember the statement here it is, I should take it to be. I don't know whether it was taken——

(AUSTIN:) It was, your Honor.

(W. AUSTIN:) That isn't the only allegation in the count regarding interstate commerce, there are others connecting it with the plaintiff.

(COURT:) Let me look at the demurrer.

(AMEY:) To disagree a moment—I don't think there is any place in that declaration anywhere where the declaration says that the plaintiff was there engaged in interstate commerce at the time of the injury.

138 (COURT:) Well, it states that he was employed by this railroad who were engaged in that business.

(AMEY:) Yes, but, your Honor will pardon me, under the decisions I don't think that is sufficient. It has got to state that he was employed at the time. If he was employed generally for that purpose and at other times had been employed in that particular service it wouldn't avail him anything in this case, for the reason that he would have to be employed at the time. It does state generally, I think, that he was in the service of the defendant, but I have in mind the decision which declared the first act unconstitutional.

(W. AUSTIN:) Well, I supposed that the words "then and there" in a declaration referred to the time and place mentioned in the declaration, and that declaration states that this "defendant was then and there engaged in interstate commerce, and being so engaged, that the plaintiff was acting as freight brakeman."

(COURT:) Well, we will overrule the demurrer and the motion and an exception may be noted for the defendant.

(AMEY:) The motion to dismiss or the demurrer?

(COURT:) The motion to dismiss may be overruled.

139 (Following is a copy of motion to dismiss.)

"Motion to Dismiss."

Now comes the defendant in the above entitled cause and moves this Honorable Court to dismiss the plaintiff's replication for the following reasons:

(1.) The replication is no answer to the defendant's plea.

(2.) Said replication is a complete departure from the plaintiff's writ.

(3.) Said replication introduces a new cause of action not contemplated in the plaintiff's declaration.

(4) Said replication does not support or fortify said plaintiff's declaration.

(5) Said replication does not present matter of estoppel to the defendant's plea.

(6) Said replication does not traverse said plea.

(7) Said replication does not confess and avoid said plea.

(8) The declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the federal employers' liability law.

(9) The action in the said declaration of the plaintiff is at common law, while the replication of the said plaintiff denominates said action as under the federal employers' liability law."

(COURT:) Well, the motion may be overruled and an exception noted for the defendant.

Exception by defendant.

140 (AMEY:) I desire to call the Court's attention at this time to a misjoinder of counts, a misjoinder between the first and the second counts and between the first and third counts.

(COURT:) How are you raising that, by demurrer?

(AMEY:) By motion to dismiss.

(WARREN AUSTIN:) That is out of time, ought to be some limit to these dilatory motions.

(COURT:) You couldn't take advantage of that in motion in arrest of judgment, could you?

(AMEY:) No, but if there is any count in the declaration which doesn't set forth a lack of knowledge on the part of the plaintiff of these various allegations of negligence or upon which negligence was founded, that, it seems to me should go out of the case on the ruling in Brainerd vs. Van Dyke.

(COURT:) That is where that *that* was a complete bar, and under the federal statute which they proceeded in and which the Court holds they are proceeding under it isn't a bar, is it?

(AMEY:) I am not so certain about that.

(COURT:) You raised that question in the other case, and why can't you raise it just the same in this case, to the charge of the Court?

(AMEY:) I can do that.

141 (COURT:) You raised it in the other case to the charge of the Court, but you may raise it this way or any way that you want to.

(AMEY:) Now, then, they have in their other counts in the declaration alleged lack of knowledge and they have got to prove it, haven't they—if they have alleged it they have got to prove it?

(COURT:) Well, we will pass upon that when we get to it, cross that bridge when we are there. Well, we will call a jury.

(Jury Called.)

(Defendant moved to have jurors who sat in the case of Niles vs. Central Vermont Ry. Co. excused from sitting on this case. All jurors were excused and adjournment taken until 2 o'clock Apr. 29th.)

(APRIL 29, 1913, 2 p. m.)

(Def't's counsel make the following motions.)

(AMEY:) A motion to dismiss the action because the body of the writ attempts allegations under the federal employers' liability law, while the conclusion and parts relative to damage are under the state statute of Vermont.

Another motion to dismiss the action because each count in the declaration is multifarious.

Another motion to dismiss the action because each count in the declaration is double, attempting to rely on both the federal and the statute law.

(W. AUSTIN:) We claim that motion is out of time.

142 (COURT:) Well, the motions may be overruled and exception noted for the defendant.

(W. AUSTIN:) If there is any question about the allegation of damages there are certain words in the declaration which could be struck out as surplusage. Perhaps I had better get the writ.

(AMEY:) Let it appear that the motions are overruled severally and exception taken to the overruling of each.

(COURT:) Yes.

Exception by defendant.

(W. AUSTIN:) This reads: "and she brings this suit for the benefit of said widow wife and next of kin minor children." Of course the construction of this language clearly is that minor children is the specific allegation, that "next of kin" is just simply a general term showing relationship. However, we are perfectly willing to have stricken out the words "next of kin" and leave it just "minor children". You notice how that reads. There is no punctuation there—"next of kin minor children". They are in this case the next of kin.

(COURT:) Well, you want to have it stricken out?

(W. AUSTIN:) Why, yes, I would like to have those words "next of kin" stricken out.

(AMEY:) We object to any amendment of that sort at
143–159 this time because it goes right to the foundation of the whole business.

(W. AUSTIN:) Well, I will let it stand, I don't care to have an exception.

(COURT:) Let it stand just as it is. You may call a jury Mr. Clerk.

* * * * * * *

160 (W. AUSTIN:) I desire to read the deposition of W. E. Lamson.

(Counsel at the Bench.)

(AMEY:) I object to the reading of that deposition for the reason that there isn't any charge of pain and suffering in the declaration, and we admit the death of Mr. White and admit that he was killed. We object to the reading if the deposition because it is a rehearsal of pain and suffering.

(COURT:) Well, you object to that portion of it that relates to pain and suffering?

161 (AMEY:) I object to the reading of it. The whole of it is in regard to what was found there, that he was practically burned to ashes when they found him and we admit his death.

(Discussion.) * * * (Notes P. 45.)

(COURT:) Now I think, Warren, I won't compel you to withdraw it, I will give you an exception. I will exclude these questions and answers that I mark just at the margin here. They are marked with a little red straight line at the left, and are these:

"Q. What was there remaining of his body at the time you arrived there?

"A. Well, just the trunk of the man. The arms were gone and head. It was so hot, you know, they couldn't take it off for awhile, and had to throw snow on to cool it off awhile there, before we could get it off.

"Q. When the body was removed did you find anything of the legs?

"A. No.

"Q. What was done with the body, if you know?

"A. Well, they put it on a board that they had taken off somewhere and gave it to me, and I and my men took it to my sled and took it down to my rooms, my undertaking rooms.

"Q. After the body was taken to your undertaking rooms what did you then do with it?

"A. Well, we cleaned it up as well as we could, and saturated it with embalming fluid, and did it all up with cloths and put it in a casket and shipped it to St. Albans.

"Q. About when was it shipped to St. Albans?

"A. On the 12th. day of January, I think, etc."

162 (COURT:) Then the rest is in. I will exclude all of that and an exception noted for the plaintiff.

Exception by plaintiff.

(PALMER:) I want to object to any evidence in this case for the grounds which I state. I may say by way of explanation that I have been examining this declaration with as much care as I could give it since I have been here, and I am unable to determine from the declaration whether we are asked to respond to an action for negligence under the statute of the State or whether we are

asked to respond for negligence under a violation of the federal statute, and I want to object to any evidence, because:

If the plaintiff is seeking a recovery under and by virtue of the Federal Employers' Liability Act of Congress, then we say there is no sufficient allegation in the plaintiff's declaration to entitle her to offer proof and subject the defendant to the payment of damages for a violation of that act, and the shortage in this regard is in no legal effect remedied by the plaintiff's replication to the defendant's plea in bar.

And further, because the allegation of the plaintiff's declaration do not state facts sufficient to constitute a cause of action against this defendant under the act of Congress known as the Employers' Liability Act, and to allow the plaintiff to offer proof under
163 his declaration because of the facts stated in his replication to the defendant's plea in bar would work a departure from fact to fact and from law to law, and the rights belonging to the defendant in his defense to the action as instituted would not be available to them if the cause is allowed to proceed under the so-called replication to the defendant's plea in bar.

And further, because the Employers' Liability Act of Congress in force at the time of the pretended wrongful acts complained of in the plaintiff's declaration, is a plenary statute in contravention of the common law, and the facts stated in the plaintiff's declaration not being sufficient to bring this action within the provisions of that act, this Court acquires no jurisdiction of the subject matter of the action, and the plaintiff's evidence now being offered is not in support of any issue lawfully before this Court for adjudication, under any sufficient statement of facts to constitute a cause of action under such Act of Congress.

And further, because the declaration nowhere charges that the train upon which the plaintiff's intestate was employed at the time of the accident, was engaged in interstate commerce, and nowhere charges that the plaintiff's intestate was at the time of the accident engaged in a service relating to or promoting interstate com-
164 merce, but said declaration does attempt to charge the defendant with negligence in the transaction of both its interstate business, as regulated by the State of Vermont, and its interstate business as regulated by the laws of Congress.

(COURT:) Well, the objection may be overruled and an exception noted for the defendant.

Exception by defendant.

(Deposition of W. E. Lamson read to the jury by Mr. Warren Austin.)

(The following question was read and an exception was taken after the reading of the question.)

"Q. Where did you find the body of Mr. White?

"A. Right up on the front of the engine, on the pilot you might say. Seemed to be crowded right up there."

Exception by defendant.

165 *Deposition of W. E. Lamson.*

I, W. E. Lamson, of Randolph, in the County of Orange and State of Vermont, of lawful age, depose and say:

Direct examination by Mr. AUSTIN.

Q. Where do you reside, Mr. Lamson?
A. Randolph, Vt.
Q. What is your age?
A. I am 69.
Q. What is your business?
A. Furniture, house furnishing, goods, undertaking, carpets and crockery.
Q. Were you at home on the early morning of January 12, 1912?
A. I sure was.
Q. Were you called upon as undertaker, to go to a wreck on the C. V. Ry. Railroad, to get a body?
A. I did.
Q. About what time were you called upon?
A. Well, I should say about three o'clock in the morning.
Q. Did you go — the wreck?
A. I did.
Q. At what place or point did that wreck take place on the Railroad, with reference to Randolph village?
Q. Well, about a mile and a half up the line, just on the edge of Braintree.
Q. On arriving there, what did you discover or find had taken place?
A. Well, I found a bad wreck. It was all on fire. There was a caboose and two cars certain, I don't know but three, I rather think there was three cars on fire. The caboose and second car was telescoped right in to the third car, you might say.
166 Q. Could you judge from the appearance, about the force which the rear train had when it struck the forward train?

Objected to.

A. Why great force, of course.
Q. Did you learn that somebody had been killed?
A. Yes, I did.
Q. Who?
A. Mr. White.
Q. Where did you find the body of Mr. White?
A. Right up on the front of the engine, on the pilot you might say. Seemed to be crowded right up there.
Q. What was there remaining of his body, at the time you arrived there?
A. Well, just the trumk of the man. The arms were gone, and head. It was so hot you know they couldn't take it off for a while, and had to throw snow on to cool if off a while there, before we could get it off.

Q. When the body was removed, did you find anything of the legs?

A. No.

Q. What was done with the body, if you know?

A. Well, they put it on a door that they had taken off somewhere, and gave it to me and I and my man took it to my sled and took it down to my rooms, my undertaking rooms.

Q. After the body was taken to your undertaking rooms, what did you then do with it?

A. Well, we cleaned it up as well as we could, and saturated it with embalming fluid, and did it all up with cloths and put
167 it in a casket, and shipped it to St. Albans.

Q. About when was it shipped to St. Albans?

A. On the 12th of Panuary. I think it went on the three o'clock train.

Q. Were you called upon on the 9th day of January, 1913, to go to the place of the wreck, and show it to Mr. John Webster, a Civil Engineer?

A. I was.

Q. Did you go?

A. I did.

Q. Did you show Mr. Webster the exact spot where the wreck occurred?

A. I did.

Q. What kind of a night was the night of the 11th and the morning of January 12th, 1912?

A. It was a very light moonlight night, very cold.

Q. Was there any wind?

A. No, I don't think so.

(Signed) W. E. LAMSON.

All formalities for sealing, filing or otherwise, for the use of this deposition, are waived by the parties.

(Signed) HIRAM P. DEE,
Justice of the Peace.

STATE OF VERMONT,
Franklin County, ss:

At the City of St. Albans, in the County of Franklin, this 10th day of March, A. D. 1913, personally appeared W. E. Lamson, and made oath that the foregoing deposition, by him sub-
168 scribed, contains the whole truth and nothing but the truth.

Before me,

HIRAM P. DEE,
Justice of the Peace.

The above deposition is taken at the request of Mary T. White, Administratrix, to be used in a cause to be heard and tried by Franklin County Court, in which cause Mary T. White, Administratrix, is plaintiff, and Central Vermont Railway Company is de-

fendant. The deponent living more than thirty miles from the place of trial is the cause of taking this deposition, and the adverse party was notified and did attend.

Certified by

HIRAM P. DEE,
Justice of the Peace.

169 (April 30th, 9 A. M.)

JOHN WEBSTER, called by plaintiff, sworn.

Direct examination by Mr. W. AUSTIN:

Q. What is your profession?
A. Well, part of my business and quite a good part of my business is surveying.
Q. How many years have you been a surveyor?
A. I have been in the business since 1869.
Q. And during that time have you continued to practice it as your profession?
A. I have.
Q. I show you blue print marked Pl'ff's Ex. "A" and ask you if that is something you made?
A. It is.
Q. Did you make it from a survey?
A. I did.
Q. Where was this survey made and when was it made?
A. It was made last January, Jan. 8th and 9th., 8th or 9th.
Q. And where?
A. At Randolph, Vt., 1913.
Q. About how far from Randolph?
A. Well, it is about a mile and a half, such a matter, north of the village.
Q. Towards Braintree?
A. Towards Braintree.
Q. Who pointed out to you the place that you surveyed?
A. Mr. Lamson, the undertaker at Randolph.
Q. And did he point out the place where the accident occurred?
A. He did.
Q. And did you indicate that on this plan?
A. I believe I did.
Q. Now how much of the territory surrounding or near to that place did you survey and include in the plan?

170 A. Well, from the place pointed out by Mr. Lamson as the place where the accident occurred we surveyed north up through the cut 900 ft. to a place marked on the plan as Dyer Crossing and from the same point "A" marked on the plan as "A" south towards the village and the place marked on the plan Salisbury Mill, that is in Fig. 1.
Q. And about how far is that south?
A. Well, it is about a mile and a half, or nearly that. The plan is drawn on a scale of 20 rods to the inch.
Q. That is the top plan?

A. The top plan marked Fig 1.

Q. What is the second plan on, what scale?

A. Fig. 2 is drawn on a scale of 100 ft. to the inch, larger scale on the Fig. 2 plan, the lower plan.

Q. Now from the surveys you made what did you do—what was the first process in getting out this blue print?

A. Well, the first thing to do would be, of course, to do the field work, your survey and draw a plan.

Q. And did you draw that plan accurately according to the survey that you made?

A. I did.

Q. And from that plan was this blue print printed?

A. Yes, sir, from that plan a tracing was made and from the tracing a blue print was printed.

Q. Now I want to know if that correctly represents the curves and distances and straight places in the track included in the blue print?

A. It does.

171 (W. AUSTIN:) We offer this exhibit to show the location and scene of the accident for the purpose of showing that there was a long space of straight track immediately in the rear of the train that was struck.

(Plan Pl'ff's Ex. A. received without objection.)

Q. Mr. Webster, what figure on this Ex. A. in Fig. 1 thereof represents the location pointed out to you by Mr. Lamson as the scene of the accident?

A. Well, at the right hand the letter A and a flag.

Q. What does the little flag to the right of flag marked "A" indicate?

A. The dot indicates the 500 ft. markup the cut which was the distance that I was enabled to look up the cut and see a man on the track.

Q. From what point could you see a man?

A. From point A.

Q. That is, you say you were unable to see him after passing that point?

A. I didn't think I could.

Q. Now what does the cross, the small cross at the right of flag A represent? I am still asking about Fig. 1 and I will call your attention to the other figure later.

A. I expect that means the place of the accident, pointed out as the place of the accident.

Q. Was there a place pointed out to you where there was a burnt telegraph pole?

A. There was. That is on Fig. 2.

Q. Does that cross in Fig. 1 represent the same locality?

A. I think it does.

172 Q. How far back from flag A is the track straight and clear of any obstruction to the view?

A. Well, clear back to the bridge at the left of B and I don't

know but farther. The track is perfectly straight until you arrive at that curve just north of the bridge.

Q. And how far is that?

A. About 150 rods, I believe. I think it is about 150 to the curve.

Q. And what part of a mile is that?

A. That is very near half a mile.

Q. Now what does this staff at the left of the bridge represent in Fig. 1?

A. Well, that is near the letter C.

Q. Well, it is to the right of letter C.?

A. Well, that represents, that is the angle between the two straight lines that are tangent to the track, the center of the curve.

Q. Well, now, what does C. represent?

A. Well that is what—Oh!

Q. Evidently you have misunderstood my question.

A. Yes, I don't understand.

Q. What do you call that (Indicating)?

A. That is a point, that is the beginning of the curve, that is where the curve meets a tangent.

Q. Yes, but what is that?

A. That is a station, that is all.

Q. An upright line with a circle?

A. Oh, it is a circle with an upright line in it that marks a point.

173 Q. And no flag on it?

A. No flag.

Q. That is the point I was calling your attention to. That represents what?

A. That is the end of the straight line, of track and the beginning of the curve; the center of the angle of intersection of the tangent would be at the flag near the letter C.

Q. And where does the curve end on the southeast?

A. Well, that would be at the next circle with the mark indicating.

Q. The next circle to the left on this plan?

A. Yes, sir.

Q. Well, what is this figure to the left of that circle?

A. Well, that represents the bridge there crossing the stream.

Q. And the next point there with the long upright white line, what was that?

A. I think that is used to indicate the yard limit.

Q. Yard limit of what place?

A. Of Randolph.

Q. And from that point in to Randolph station how is the track—whether straight or crooked?

A. Straight.

Q. How far is it from that point in to the station?

A. The map doesn't show any farther than Salisbury Mill but I have the distance here, I will look it up. I think it is about 180 rods from the point C. in to the depot.

Q. And can you see from the depot to the point C. and from point C to the depot?

A. Well, probably, yes, you could, I think.
174 Q. And how far is the point C. from point A.?
A. Well, it is 20 rods to the inch, and I don't know as I have a note that separates that distance.
Q. I wish you would just scale it and tell us?
A. Well, it is a little over 340 rods.
Q. How many rods in a mile?
A. 320.
Q. So that this is a little over a mile?
A. It is.
Q. And you say it was 180 rods from there to the station?
A. Yes sir.
Q. So then, how far is it from the scene of the accident to the station at Randolph?
A. Well, that would make 520 rods.
Q. And that is how much in miles?
A. Well, that would be a mile and 200 rods.
Q. 200/320 this is what, reduce it please?
A. Why, it is a mile and a half and an eighth.
Q. Nearly a mile and three-fourths?
A. Nearly.
Q. Now what is this object marked Highway on the Fig. 1?
A. Well, that is the highway that runs north.
Q. About how far from the scene of the accident was the highway?
A. Why, it runs within three or four rods, right nearby.
Q. Well, look at the second Figure, Fig. 2 on this plan A and tell us what these points are, indicated by letters and marks in this plan?
A. Well, the point A. near the center of the plant with the flag there represents the place pointed out as the place where the
175 accident occurred at the south end of the cut, and those straight marks with crosses near the top are telegraph poles, the right hand one is marked "Burnt Telegraph Pole" charred clear to the top. The next cross under 500 with the flag shows the point 500 ft. up the cut where one could stand at point A. and look up the cut and see anyone standing on the track. The points marked "900" and "Dyer's Crossing" at the right is a point 900 ft. up the curve, which is the distance from the commencement of the curve up to the crossing.
Q. That curve commenced at A. or does it commence up?
A. Well, commences about at the flag, I think.
Q. Then this curve commences pretty near where the scene of the accident was?
A. Yes, it does.
Q. Now how much track is represented by the balance of the figure to the left of A?
A. Well, it is a portion of the straight track south of the place of the accident, and it is drawn on a scale of 100 ft. to the inch, so that it shows about 12 or 14 hundred feet, perhaps.
Q. Was there any other point along that line of track where an

onject, a train of cars, freight train passing over the track from B. to A. could have been seen?

A. Why, yes, you could see from the bridge at the left of B. and I think some distance south from the bridge, southeast.

(PALMER:) You are speaking now of Figure 1?

(W. AUSTIN:) Yes.

176 Q. What was the grade of track from Randolph to the point pointed out as the accident——

A. Well, it was up grade.

Q. How much of an up grade?

A. Well, I tried the grade at the cut and it seemed to be on the grade of about 33 ft. to the mile, and south of the cut on that level stretch mark "Embankmant" it was very slight grade up grade about ten feet to the mile, right at the left of the letter A.

Q. So that the sharp grade commenced on this curve at the point where this accident occurred, did it?

A. Yes, sir.

Q. And back to Randolph was there any more grade than at the point marked "Embankment"?

A. Why, I didn't notice that there was. There might have been, but I didn't notice that there was.

Q. Wasn't enough to attract any attention?

A. No.

Q. Was that a single or double track through there?

A. Single track.

Q. Tell us again what mark on this plan is indicating the scene of the accident?

A. Well, letter A in the upper plan Fig. 1, the letter A right above the flag indicated that point, and on the lower plan it is the same, the letter A and a flag represents the scene of the accident.

Q. How was the point of compass indicated on this plan?

A. Well, it is indicated by an arrow, what we call a north point crossing the border line between the two figures.

177 Q. And which is north?

A. The arrow. The head of the arrow would point north and it would be to the lower right hand corner of this map, of this plan.

Q. So this track runs from Randolph, or rather from the left of the plan to the right of the plan what is the direction?

A. Well, it would be northwest.

Q. And a train proceeding from, over this track from Randolph to Braintree would be going northwest?

A. Northwesterly.

Cross-examination waived.

178 L. O. GIBBONS:, scalled by the plaintiff. Sworn.

Direct examination by Mr. WARREN AUSTIN:

Q. You live in St. Albans?

A. Yes, sir.

Q. And what is your business?
A. Flagging.
Q. Flagman?
A. Flagman, yes, sir.
Q. In January, 1912, were you also railroading?
A. I was.
Q. And for the same Company?
A. For the same Company.
Q. On the 11th day of January and the time right around there what work were you doing for the company?
A. I was working as Conductor.
Q. And for how long a time had you been working as a conductor for them?
A. About three months, as I remember.
Q. And how long a time after that did you work for them as a conductor?
A. Not long after.
Q. Now of what train were you conductor on the 11th of January, 1912?
A. Of an extra freight train 401.
Q. What is this little green book marked "Pl'ff's B."?
A. It is the book of rules of the transportation department of the Central Vermont Railway, the rules and regulations.
Q. Was this set of rules contained in this book in operation and force January 1912?
A. Yes.
Q. Now I call your attention to page 28, Rule 97 and ask you if that rule governed or was in effect at the time when you were conductor of train 401?
A. It was, yes, sir.

(Rule 97 read to the jury by Mr. Austin.)

179 *"Rule 97."*

Extra trains must not be run without train orders."

(W. AUSTIN:) Have you the original of the train orders that were given to Mr. Gibbons on that occasion the 11th of January, 1912?
(AMEY:) I haven't got them, but I will try and get them for you.

Q. I suppose this train 401 was run by train orders on the 11th of January, 1912?
A. Yes.
Q. Do you know what has become of those train orders?
A. I don't remember what became of them now.
Q. When did you last see them?
A. On leaving Randolph when I looked my orders over, the last time I remember of seeing them.
Q. That was just before the——?
A. Just before the accident.

Q. And since the accident do you remember of ever having seen them or having them in your possession?

A. No, I do not.

Q. What is the custom of conductors on freight trains with reference to the keeping of orders in their care?

A. Well, it is a custom with some to hang them on a hook in the caboose where they can have access to them any time they want to look at them.

Q. Do you remember whether you hung yours up in the caboose or not?

A. I don't remember what I did with it.

180 Q. Well, I am going to show you paper marked "Pl'ff's C." and ask you if you know what that is?

(AMEY:) We object to his testifying from the paper. He has brought on the ground that it hasn't been properly identified.

(W. AUSTIN:) That is what I am trying to do.

(AMEY:) If it is a copy we object to its use on the ground that the loss of the original has not been accounted for.

(COURT:) He don't offer it yet, as I understand.

(AMEY:) I want to interpose my objection in season.

A. I would like to ask if this is supposed to be engine 401?

(AMEY:) I object to that. The witness can't ask the examiner questions.

(COURT:) The question is what is this paper or that in substance.

(W. AUSTIN:) I asked him if he knew what that was.

(COURT:) Yes, that is all.

A. Yes.

Q. What is it, Mr. Gibbons?

A. It is 31 order.

(AMEY:) Object to that and want an exception to that. I don't know what he is testifying from.

(COURT:) What is the objection?

(AMEY:) He has got a paper there and I don't know what it is and he is asking him about it.

(COURT:) Well, he says it is a train order.

(AMEY:) Well, I desire an exception to that.

181 (COURT:) What is the exception to that?

(AMEY:) Because it hasn't any connection with this case at all.

(COURT:) Well, an exception may be noted.

Exception by defendant.

Q. From your recollection, Mr. Gibbons, what do you say whether that is a copy of your running order out of White River Junction, or not?

(AMEY:) I object to that. The reason is that the paper hasn't been properly identified. It hasn't been shown that the paper was

the paper he had on the night of the accident, and we have no knowledge as to it- source, and the loss of the original paper has not been accounted for, also.

(COURT:) Well, he isn't offering it yet. When he offers it you will have an opportunity.

(AMEY:) I object to his testifying from it.

(COURT:) Well, he may answer that question and an exception noted.

Exception ny defendant.

A. I should say that it was, yes.

Q. Have you ever turned in to the defendant's hands the original order?

A. I have not.

Q. Now, was anybody on your van who had access to that order, is there anybody alive who had access to that order except

182 you?

A. No.

Q. And you have never seen it or had it since the wreck?

A. Not as I remember of.

(W. AUSTIN:) Now, if the court please, in connection with his testimony we offer this copy of the order.

(AMEY:) I desire the same objection to the introduction of the order that I made before to the evidence of the witness.

(COURT:) That is, that the loss of the original hasn't been sufficiently accounted for?

(AMEY:) Yes, and that this copy has not been authenticated, that we don't know anything about its origin, that the source of it hasn't been shown.

(COURT:) Well, have you shown any search for it, or anything by this man?

(W. AUSTIN:) Well, no, I will ask him.

Q. Have you tried to find the original order?

A. I have tried to find them, yes.

Q. And you have been unable to find them?

A. No.

Q. Have you exhausted all such search as could be made to discover that?

A. Yes.

Q. I suppose thee defendants as well as the plaintiffs, have desired those original orders of you, have they not?

A. No.

Q. Have you be-n before the Railroad Commission?

A. Yes.

Q. And they asked you about them there?

183 A. I don't remember whether they asked me or not.

Q. At any rate you know you have exhausted all means of ascertaining where they are?

A. Yes.

(COURT:) Well, we will receive the paper subject to exception.

(AMEY:) I would like to ask a few questions.
(COURT:) Very well.

Cross-examination by Mr. AMEY:

Q. Where have you hunted for that order?
A. In my clothes, that I had on at the time. I didn't know but I had them in my pockets instead of them being in the caboose.
Q. And you don't know where that order went to, the order you had?
A. I don't, no.
Q. And do you remember the reading of that order, just how it read?
A. Why, I don't think I could state it just word for word, but very near.
Q. Then you are not positively sure that this is a duplicate of it, are you?
A. Well, I couldn't state it word for word that it is a duplicate, but it is nearly the same thing.
Q. You are not satisfied that it is exactly the same?
A. I would be if it wasn't for one word.
Q. Well, you don't know whether anybody else has searched for it, do you?
—. I don't know of anyone else that has searched for it.
184 Q. Did you ever advise any of the company in regard to the loss of it?
A. No.
Q. So you were the only one who knew anything about the search after the order?
A. My orders, I am the only one.

Direct examination resumed:

Q. What is that word, Mr. Gibbons?
A. It is the number of the engine. I couldn't positively state whether that was my engine or engine 400.
Q. There is a figure there that is confusing?
A. I should say that figure is confusing. If that was 401, if I could say positively that that was 401, I should state that that was the original order, duplicate of the original.
Q. And this is addressed to your engine, is it not?
A. That is addressed to 401. That is addressed to my engine.
Q. And have you any reason to doubt that that is a copy of your running order?
A. I have no reason to doubt, with the exceptions of the number of that engine; that is all I know.
Q. If that means 401 does it convey the sense and meaning that the original order did to you?
A. Yes.

Exception by defendant.

Cross-examination by Mr. AMEY:

Q. Can you tell what is on that order without looking at it?
A. Yes, I think so.
Q. How long since you have seen the original order?
A. It is a year ago the 12th of last January.
185 Q. And you haven't seen it until you see this order today?
A. No.
Q. What you say you think is a copy?
A. No.
Q. Now are you sure that that is a copy?
A. I should say that that was a copy.
Q. Well, you might be mistaken about it?
A. Could be mistaken in anything.

(W. AUSTIN:) I understand this is admitted, your honor.
(COURT:) Admitted and an exception for defendant.
(Pl'ff's Ex. "C".)
Exception by defendant.

Direct examination resumed:

Q. "C. & E." what does that mean?
A. Conductor and Engineer.
Q. "C. E. S." what does that mean?
A. That is the signature of the Superintendent.
Q. What is his name?
A. C. E. Soule.

(Pl'ff's Ex. C. read to the jury.)
W. AUSTIN:) Now I desire to read Rule 103.
(AMEY:) We haven't any objection to that.
(COURT:) It may be received.

Rule 103.

"Messages or orders respecting the movement of trains or the condition of track or bridges must be in writing."

(Rule 220 offered and received.)

Rule 220.

"Train orders once in effect, continue so until fulfilled,
186 superseded or annul-ed. Any part of an order specifying a particular movement may be either superseded or annul-ed. Orders held by, or issued after, or any part of an order relating to, a regular train, become void when such train loses both right and schedule as prescribed by rules 4 and 82, or is annul-ed.

When conductors or engineers change off, they must transfer all orders effecting their trains. Each must know that the orders transferred are correctly understood by the other, and obtain his written receipt therefor. Before either train proceeds, the engineer must read his orders to the conductor."

Q. Now, having received this order, what time did you leave White River Junction?
A. About six o'clock P. M.
Q. And did you meet according to that order trains 336 and 415 south at West Hartford?
A. I did.
Q. Can you remember how long you stopped at West Hartford?
A. Why, 35 or 40 minutes.
Q. Now, then, from there where did you go?
A. I proceeded to South Royalton.
Q. Now, let's see if you obtained any order at South Royalton. What is this paper marked Plaintiff's D?

187 (AMEY:) The same objection that I made to the other, to his testifying from the other.
(COURT:) Well, you object to this question?
(AMEY:) Yes.
(COURT:) Well, the answer may be received and exception noted. Exception by defendant.

A. It is a 31 order.
Q. What is the meaning of that, Mr. Gibbons?
A. No. 31 order?
Q. Yes?
A. Do you want the rule for that?
Q. No, I don't care to have you specify the number of the rule, but just what is a 31 order. Is it a running order?
A. It would be a running order or a meet order.
Q. In this case, this "Pl'ff's Ex. B" represents what?
A. Represents a running order and a meet order.
Q. And to whom was it addressed?
A. It was addressed to Extra 401.
Q. That was your train?
A. That was my train.
Q. Now is that a copy of an order that you received that night at South Royalton?

(AMEY:) Same objection that I made to the other.
(COURT:) He may answer the question and an exception noted. Exception by defendant.

188 A. Yes.
Q. Now, I show you paper marked "Pl'ff's E" and what is that?
A. 31 order.
Q. And what is it a copy of?

(AMEY:) Same objection to that.
Exception by defendant.

A. I should say that was a copy of an order that I had at the time, that I received at South Royalton.
Q. And when I asked you and you answered questions regarding

the loss of original orders, did you understand me and did you intend yourself your answer to cover all the orders of that trip?

A. All the orders of that trip.

(AMEY:) I want to make the same objection to these that I made to the introduction of the other train orders, the other copies.

(COURT:) Well, they may be received and an exception noted. Exception by defendant.

Pl'ff's Exs. D and E read to the jury.

Q. Now, at that time when you were receiving your orders there at South Royalton, did you see a similar order to this train 403, that included the meeting of any other train on the road?

A. I saw a different order, that this 403 south was to meet the 708 at West Hartford.

189 Q. And that was at what time of night?

A. Well, probably around ten thirty. I can't say definitely.

Q. I want to call your attention to the time these two were made complete, one of them 9.20 and one at 10.12, was it about the same time that you saw these orders?

A. Why, I should say it was around 10.30, I can't say definitely what time it was, I don't remember.

Q. Now, then, did you execute that order?

A. I did, yes, sir.

Q. And in the execution of that order what were you obliged to do—that is yo- say, were you obliged to wait there?

A. I was obliged to wait at South Royalton until that 403 came along.

Q. Was that order superseded or annul-ed, the last one?

A. The last one was not, no.

Q. And it was fulfilled?

A. It was fulfilled, yes.

Q. Now, does an extra train have any schedule unless it is given in this manner by a train order?

A. No.

Q. And you obey a train order as in this case you say you obeyed the order last mentioned, "Pl'ff's Ex. E", have you no schedule than that?

A. No.

Q. About how long did you wait there?

A. Why, two hours and a half I should judge.

Q. I don't suppose in giving these times that you attempt to be perfectly accurate about it?

190 A. I wouldn't attempt to give them to the minute, because I can't state.

Q. Well, at the time that 403 got there, was there any other train with her or near her?

A. Why, we had to stay there for a passenger train, or No. 10 train south, didn't have time to make Bethel.

Q. And that was a train that had a schedule, was it?

A. Yes.

Q. And you couldn't leave South Royalton so as to interfere with the schedule of that passenger train?

A. Yes.

Q. So that at South Royalton, you met two trains?

A. Yes.

Q. Now at the time when you left South Royalton—by the way, how soon after the arrival of 403 and No. 10, did you leave South Royalton?

A. I drew right out as soon as they set the switches.

Q. And got under way right off?

A. Yes.

Q. Do you remember whether they passed south, had started south before you started north from South Royalton?

A. Well, the Extra 403 had; when we started pulling out of the passing track No. 10 was still at the station.

Q. Standing still?

A. Just starting about the same time we started.

Q. And could they run behind the other train 403 nearer than five minutes?

A. No.

Q. So that you knew from what you saw at South Royalton that this train 708 was as far behind as it would take those two
191 trains to go to West Hartford, and for 708 to come from West Hartford to the point that you had arrived at, did you not?

Objected to. Question waived.

Q. I will ask this question, Mr. Gibbons, when you saw that order to 403, that involved the meeting of 708 at West Hartford, what information did it give you of the distance that 708 was away from you?

A. Why, I knew that they wasn't north of West Hartford.

Q. And did you also know that they couldn't get north of West Hartford until 403 and No. 10 arrived at West Hartford?

A. They could have given them different orders to that effect.

Q. But on that order?

A. Well, that special order, they couldn't leave West Hartford.

Q. And did you see any order that superseded or annul-ed that order and gave them new rights?

A. I didn't see the order, although it might have been placed.

Q. Now, did you have any other knowledge except that of the train 708?

A. I did not, no.

Q. And at any time during that trip from White River Junction until the accident, did you have any direct notice from this defendant of the position of 708?

A. No.

192 Q. Did you as conductor of 401, have any order at all from the train dispatcher of this defendant on 708?

A. No.

Q. Now, you left Royalton as soon as No. 403 and No. 10 arrived there?

A. Yes.
Q. When was your next stop?
A. Bethel.
Q. At Bethel what happened?
A. Why, we took water and the engineer and the fireman shook down the fire.
Q. By the way, was this a pretty cold night?
A. As I remember it, it was from thirty to thirty-five below zero.
Q. It felt that way to you, did it?
A. Yes, it did.
Q. And how much of a load did you have?
A. 18 loads and 16 empty cars.
Q. What kind of an engine?
A. Compound engine.
Q. Whether low wheeled or high wheeled?
A. They are considered a low wheeled.
Q. How long do you think you stayed at Bethel?

(AMEY:) I object to that on the ground that the record is the best evidence.

(W. AUSTIN:) Well, we can't put this all in at once. I want to get his memory of it. We shall offer, if the court please, the train sheet, and if they are willing to concede that what appears on that train sheet is correct, and that what appears thereon is all a record of fact and true, why we won't go in to these times except as we proceed along to show the jury where we are. Are you
193 willing to concede that about the train sheets?

(AMEY:) I don't want to make concessions because I don't care to make concessions, as a matter of principal, but the train sheet is the best evidence and my objection is on that ground.

(COURT:) That objection being made pretty nearly concedes what you ask him to concede, isn't it, the ground of the objection?

(W. AUSTIN:) It practically does * * * I will waive that question.

Q. Were you delayed at Bethel any unreasonable length of time?

Objected to. Question waived.

Q. What did you have to do at Bethel?
A. We had to take water.
Q. And in taking water, did you consume any more time than usual and customary for taking water?
A. As I remember, the engineer and fireman shook down their fires. Sometimes they take the time to do it at paces like that and some times they don't. It is just as the shape of their fire is.
Q. And other than that, was there anything else done there?
A. No.
Q. And as soon as you had taken water and shaken down the fire, what did you do?
A. Proceeded.
194 Q. About how long does it take to shake down the fires and take water?

A. Why, right around 25 minutes.
Q. Did you receive any order at Bethel?
A. I don't remember.
Q. Then you went where?
A. Proceeded to Randolph.
Q. Now did you get an order at Randolph?
A. I did.
Q. What kind of an order was it?
A. It was a 19 order.
Q. What is an 19 order?
A. A 19 order, the one we had that night, was giving time on a passenger train.
Q. Can you remember what that order was?
A. I can't remember the time that was given, but it was time on No. 6 passenger train.
Q. And that means what?
A. That means it was—they would run so many minutes later, as this one was.
Q. I don't quite understand that. Were they behind you or coming towards you?
A. They were coming towards me.
Q. And this wasn't a meet order, was it?
A. No, it was an order that No. 6 would run so many minutes late.
Q. And that would give you what rights?
A. That would give me rights to use that time and as much later as the order stated, as the schedule time.
Q. That was a warning to you, was it, about the location of that train?
A. Yes.
Q. Did you ever reach that train that night?
A. No.
Q. What did you do there at Randolph?
A. We—the engineer pulled up by the station, we was
195 proceeding to Braintree, the order board was out, he had a 19 order to hand on to the engineer. I don't know whether the engineer missed the order, or whether he put his brakes on so hard that it stopped him, but I remember that he stopped and I understood that he didn't catch the order.
Q. You were intending to go right by?
A. Yes.
Q. And not stop?
A. No.
Q. And the order board was out, was it?
A. Yes.
Q. And in fact you did stop, did you?
A. We did stop.
Q. After the engine had run by the station?
A. Yes.
Q. And about how long were you there?

A. About four minutes, four or five minutes.
Q. And then what happened?
A. Well, the engineer got his brakes releasee and proceeded to go.

(Mr. Austin reads Rule 221 to the jury.)

Rule "221.

"A fixed signal must be used at each train order office, which shall indicate stop when trains are to be stopped for train orders. When there are no orders, the signal must indicate proceed, except as provided in Rule 91.

When an operator receives the signal "31" or "19" followed by the direction, he must immediately display the stop signal for the direction indicated, and then reply stop displayed and in the direction; and until the orders have been delivered or annuled the signal must not be restored to proceed except by train order.

196 "A train stopped by a train order signal must not proceed without a Clearance Card Form "A" or a Caution Card Form "C", although train orders may have been received.

Operators must have the proper appliances for hand signaling ready for immediate use if the fixed signal should fail to work properly. If a signal is not displayed at a night office, trains which have not been notified must stop and ascertain the cause, and report the facts to the Superintendent from the next open telegraph office."

(W. AUSTIN:) Now I desire to read this *this* Form "A" and Form "C" referred to in the rule, and the rule governing the filling out of that form, page 122.

"Form (A).

Central Vermont Railway Co.

Clearance.

(B) 6.45 M. June 5, 1911.
Train No. 12.

I have orders (5-7 and 9) (Nil) for your train. The next train ahead is (Extra 751. It left this station at 8.35 a. m., and arrived at (C) at 8.55 a. m. Signal is displayed for (Extra 576) (Block) and does not now affect you.

JOHN JONES, *Operator.*

This does not affect any train orders you may have received.

Conductors and engineers must each have a copy, and see that their train is correctly designated in the above form.

197 NOTE.—The numbers of orders for the train must be filled in in figures. When there are no orders the word "nil" must be written in. If the next train ahead has not reached the next telegraph office the words "not yet" must be written in the

blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type. Operators must keep the lowest copy.

When the automatic Block Signals are in service instead of Station Block the information relative to the train ahead may be omitted."

Q. Is there any system of automatic train signals and blocks on this line?

A. No.

("Form C.)

Central Vermont Railway Co.

Caution Card. No. 9.

Station D; 9:15 A. M. April 1, 1911. Conductor and Engineer No. 26 on Eastbound Track No. —. Further orders for your train: Proceed with caution expecting to find track obstructed.

JOHN JONES, *Signalman.*

This card does not interfere with or countermand any orders you may have received. It is authority to pass the signal and proceed prepared to stop within range of vision.

Engineer and conductor must each have a copy and see that it is properly filled out and signed and that their train is correctly designated."

Q. Did you see the operator there at Randolph?

A. I saw him when he handed me *on* the order.

Q. Did you see the lights on at Bethel, at the station at Bethel?

A. The order board light.

198 Q. Did you notice that the station was open at Bethel when you came through it?

A. I don't remember whether I noticed that or not.

(Rule 222 on page 40 offered and read without objection.)

Rule 222. "Operators will promptly record and report to the train Despatcher the time of arrival and departure of all trains."

(W. AUSTIN:) On page 98 rule S.-71.

(AMEY:) Object to that on the ground that it is immaterial.

(COURT:) Well, what is the offer?

(W. AUSTIN:) We offer to show by that rule that the movement of trains shall be supervised by Train Depatcher.

(COURT:) Well, supposing that is the rule, they say it is immaterial—how is it material?

(W. AUSTIN:) Well, we claim that this Train Despatcher here at St. Albans had information of when 401 passed South Royalton, when it passed Bethel, when it passed Randolph, and knew the position of train 708 when it reached South Royalton with reference to this train 401: That he knew the position it had gained

when it reached Bethel, and that 401 didn't know it and that 708 didn't know it, but this man whose duty it was to operate those two trains knew it, and could see as plainly as if the objects were on a checker board before him that the one was overhauling the
199 the other, and he didn't notify either of the fact; that he should have stopped that train that was pursuing the other one at Bethel; that he should have told them that 401 was on that track ahead of them and only a few miles away; that certainly he should not have allowed them to pass Randolph—but I don't want an exception if I can avoid it.

(AMEY:) I want to take an exception to the offer and to the argument of my brother inasmuch as he is withdrawing his question at this time, because he has been testifying.

(W. AUSTIN:) Well, I certainly didn't intend to testify. I thought I was answering the question of the Court.

(COURT:) Well, Gentlemen of the Jury, you should not—what was said by counsel here to the Court just now, you should not consider that at all in determining any issue in this case. It wasn't directed to you. It was to the Court. An exception may be noted for the defendant.

Exception by defendant.

(W. AUSTIN:) I waive that offer that is objected to. Now I desire to read Rule 323, page 159.

(AMEY:) I object to it on the ground that it is immaterial.

(W. AUSTIN:) I waive the offer. I offer to read rule 324 on page 160.

(AMEY:) I object to that on the ground that it is immaterial, that it has no bearing upon this case.

(W. AUSTIN:) Well, I think that so important that I
200 couldn't afford to waive the reading of that rule. We expect, if the court please, to show that when 708 left Bethel, the station before Randolph, that they were given a Clearance Card.

(AMEY:) We think these offers that are being made continuously they ought to be made at the Bench.

(AUSTIN:) We insist that we have got a right to proceed in a legal manner, and if objections are made that we have a right to have the objection passed upon in a legal manner.

(COURT:) Yes, that is true. Well, so far as coming to the Bench is concerned, I don't suppose the Court has the power to compel the counsel to do it. I suppose they had a right, if they so desire, to present their views in the Bar or in any manner.

(W. AUSTIN:) I am not fussy about that. If they want me to come to the Bench I am perfectly willing to come to the Bench.

(COURT:) Well, come to the Bench.

(Counsel at the Bench.)

(W. AUSTIN:) We are going to show that at Bethel the operator had a record of the time when 401 passed there, or rather that he ought to have had a record under this rule, it was his duty to have a record of the time when 401 passed there, and that he ought

to have informed himself in regard to the approach of 708 and be prepared to furnish information to 708.

(COURT:) Begging your pardon—your declaration alleges those—

(W. AUSTIN:) Oh, precisely.

201 (COURT:) Well, then, why need you show it by rule, if it is a piece of negligence on their part to show that? If they want to justify under the rules they can show the rules. It isn't anything that necessarily requires—that is a fact that is not a fact of record that you are bound to show, as I understand the law. That is, you allege the fact that that is negligent. Well, now, a breach of their rules don't necessarily imply a neglect of duty. But the rules may justify if they are in general use throughout the country; but a failure to comply with the rules don't necessarily prove negligence. As I understand, rules may justify the action of the company if they are adopted generally throughout the country as being, if they keep within the rule, as being a prudent act. That may be an indication, as I say—it may apply that being adopted by the country generally, and their failure to comply with them that it may operate the other way. But you are not wholly tied down to the rules or bound to prove that negligence by failure of the rules.

(W. AUSTIN:) I think I have alleged that they violated their own rules. I had'nt quite finished, your honor, what I was going to show.

Now, I expect to show that when 708 got its clearance card at Bethel, that this operator drew a dash through the space where the rule says he must tell him when 401 left this station, and know-

202 that that train was between Bethel and Randolph at that time, and only twenty-one minutes away, he gave him no information at all, omitted it from the Clearance Card.

(COURT:) Well, take your own course. Now, what is your objection?

(AMEY:) My objection is that on the offer made the rule 324 is netirely incompetent, irrelevant and immaterial. That is my objection.

(COURT:) Well, I am inclined to receive it and note an exception for defendant.

Exception by defendant.

Rule 324.

"Operators are required to keep a record of the time trains pass their stations, inform themselves in regard to approaching trains, and be prepared to furnish information promptly to such persons as should receive it."

203 Q. Did this operator at Randolph give you any information of the position of train 708, when you arrived at Randolph?

(AMEY:) We object on the ground that the question is incompetent, irrelevant and immaterial. The rules in operation do not

require the operator to give any information unless he is requested to do so, and I would like to have the objection apply to this line of questioning.

(COURT:) Well, this question may be received subject to objection of defendant.

Exception *of* defendant.

A. No.

Q. Now, did Enoch L. White, the plaintiff's intestate, see that order so far as you know, down there at South Royalton, that you saw, addressed to 403, to meet 708 somewhere?

(AMEY:) Same objection.

Exception by defendant.

(AMEY:) The question is leading.

Q. So far as you know. I will ask only for your knowledge.

A. Not as I knowo of.

Q. Did you tell him anything about that order?

Same objection and exception.

Exception by defendant.

A. I don't remember.

204 Q. What was Mr. White's position on your train?

A. Flagman.

Q. At which end?

A. The rear end.

Q. Was there anyone else in the caboose of that train except you and Mr. White?

A. No.

Q. I show you paper marked "Pl'ff's F"; what is this?

A. It is the time table.

Q. Does that show the mileage from White River Junction to Randolph and Braintree?

A. Yes.

(W. AUSTIN:) We offer this to show the mileage from White River Junction to the scene of the accident.

(AMEY:) Well, we don't think it shows the mileage from White River Junction to the scene of the accident, but does from White River Junction to Randolph.

(W. AUSTIN:) Well, of course with other testimony it tends to show the distance from White River Junction to the scene of the accident.

(AMEY:) Well, we haven't any objection.

(COURT:) It may be received. (Pl'ff's Ex. F.)

(W. AUSTIN:) White River Junction to West Hartford, 7.6 miles, West Hartford to Sharon, 5.7 miles; Sharon to South Royalton 5 miles; South Royalton to Royalton 2 miles; Royalton to Bethel 5 miles; Bethel to Randolph 7.1 miles; Randolph to Braintree 5.7 miles.

Q. Now, Enoch L. White you say, was the rear flagman of 401? and that there was no one else on the rear end except yourself

and Mr. White. Who was on the forward end of the
205 train?

A. The forward brakeman, the engineer and fireman.

Q. And their names, please.

A. The Brakeman's name was George Naylor.

Q. Where is he?

A. I don't know.

Q. Have you seen him for some time?

A. I haven't seen him for nearly a year, I guess.

Q. And fireman's name?

A. I don't remember the fireman's name.

Q. Was it Dufrono?

A. I wouldn't say the name now.

Q. Do you remember if he was a little French boy?

A. He was French, yes.

Q. Who was the engineer?

A. Pingston.

Q. Where does Pingston live now?

A. I understand he lives in Bellevue, Canada.

Q. Ontario?

A. Yes.

Q. Is he here in town, have you seen him?

A. He was, I saw him yesterday.

Q. And the forward brakeman's name? Do you remember what his name was?

A. George Naylor.

Q. Strong, was he on the other train, was he?

A. Strong was on the other train.

Q. Now, what is the nature of the grade from Royalton to Randolph, South Royalton to Randolph?

A. Well, it is grade and there is level places mixed.

Q. Some pretty stiff grades there?

A. Some stiff grades.

Q. Coming out of Bethel, how does the track run there?

206 A. It is a grade out of Bethel, coming north, up grade coming north.

Q. And you would call it, what kind, compared with the general grade of the main line, what you say about that track between Bethel and Randolph?

A. It is on a grade and level places.

Q. And when you strike out of Randolph going north, what is the lay of the track there?

A. A slight grade.

Q. Slight grade?

A. Leaving Randolph.

Q. And you started from a standstill at Randolph?

A. Yes.

Q. Now, what rate of speed had you attained when the accident happened?

A. I judge we were making about twelve miles an hour.

Q. What was the first knowledge you had of the presence of 708?

A. I heard them.

Q. And about how long before you had some evidence of them, was that?

A. When I picked myself up out in the snow.

Q. Did you feel anything?

A. I didn't feel any jar, no.

Q. Didn't feel any jar?

A. No, felt myself falling is the first I felt.

Q. How soon after you heard the noise, was it, that you felt yourself falling?

A. Well, there wasn't but a very short space of time.

Q. Was it almost instantaneous?

A. I heard them and glanced over my shoulder and saw
207 the headlight, and just hollered out to Mr. White and felt myself falling, the next I realized.

Q. Where did you find yourself?

A. 15 or 20 feet from the track in the snow.

Q. Which side of the track?

A. Right hand side going north.

Q. When you got up what did you observe, what did you see?

A. I saw a fire, I believe, about the first thing.

Q. Did you see this other train, 708?

A. Well, they was, I could see them at a distance, they was probably five or six cars from where I was.

Q. And what had happened, tell us, describe that situation?

A. Well, they went through the caboose, this engine went through the caboose, and into the rear of the next box car, and destroyed the caboose, on one side of the track, this side of the track, completely destroyed. The monitor of the caboose, as we call it, was out near where I was, and when I got up to the engine I see it was nosed into the rear box car.

Q. Do you know what was in that first box car, front of the caboose on your train?

A. Why, as I remember it, it was butter tubs, something like that, pails.

Q. Pine pails were they?

A. Yes.

Q. And how much of a fire was there there?

A. Why, it was—everything was afire, two cars.

Q. Did you see anything of Mr. White?

A. No.

208 Q. Did you try to find him?

A. Yes.

Q. Where were you sitting when the train struck you?

A. I was sitting in the monitor of the caboose.

Q. And facing what way?

A. Facing the north.

Q. And facing the north, that was the direction your train was going?

A. The direction we was going.
Q. And where was Mr. White?
A. He was sitting down in the body of the caboose.
Q. And whereabouts, near the stove?
A. Near the stove.
Q. About how long had you passed out of Randolph when they struck you?
A. Well, I can't answer that definitely to a minute, but ten or 15 minutes, twelve or thirteen.
Q. Did you have any warning of any kind, or any notice of any kind that 708 was approaching you?
A. No.
Q. Did you have any reason to believe, Mr. Gibbons, that 708 was going to run into you there?
A. No.
Q. I suppose that your opportunities to know about that were as good as Mr. White's were they not?
A. Yes.
Q. You say yes?
A. Yes.
Q. You were a superior officer to Mr. White on that train?
A. Yes.
Q. What became of Mr. White?
A. Why, he was—from all appearance seen, he must have been crowded through the forward end of the caboose into the next box car by the engine.
209 Q. And where was he found finally?
A. He was found on the pilot of the engine, front end.
Q. Was he dead?
A. Yes.
Q. Now what kind of a brakeman was Mr. White?
A. Mr. White was a good brakeman.
Q. What kind of a fellow was he?
A. He was a gentleman in every way.
Q. How long had you known him?
A. About two or three years.
Q. Was he industrious?
A. Yes.
Q. Did you have any relationship with his family in any way?
A. I did not, no.
Q. Now, you say the train was made up of 18 loads and 16 empties 401 for an engine, and I suppose the caboose was in addition to these cars, was it, or do you count that as an empty?
A. Count that as a load.
Q. You count that as a load?
A. Count that as a load.
Q. So that the caboose is included in the 18 loads, is it?
A. Yes.
Q. Now, what did you have on the rear end of the caboose?
A. Well, there was two rear box cars, was pails or butter tubs,

something like that, and then there was five empty coal cars, and I don't remember what the rest of them did consist of.

Q. Well, now, what was on the rear end of your train, did you have markers on?

A. Yes.

210 Q. Describe what those are?

A. There are two, as we call them, tail lights, two red lights to the rear and green lights to the sides, and both sides and to the front.

Q. And was there any other light out there?

A. There was a red lantern.

Q. Were they all lighted?

A. Yes.

Q. What kind of a night was this?

A. Clear, cold night.

Q. And about how far was it from the place of the accident, how far back from the place of the accident, can you see?

A. About a half a mile.

Q. How far from Randolph station looking north, can you see?

A. Well, about three fourths of a mile I should say.

Q. Are there some diagrams of those markers in this book?

A. I think there is, yes. Right there the way mine were.

(Mr. Austin shows the top figure on page 140 of Pl'ff's Ex. "B" to the jury.)

Q. Now, tell where the red lantern was in addition to those markers?

A. The red lantern was in this position, hung on a hook. There is a beam across from each side, and this red lantern was hung on a hook in the center.

Cross-examination waived.

211 LEWIS H. RUSSELL. Called by plaintiff, sworn.

Direct examination by Mr. WARREN AUSTIN:

Q. What is your business at the present time?

A. Farming.

Q. And whereabouts?

A. Cambridge, Vt.

Q. And in January, 1912, what was your business?

A. Brakeman.

Q. For whom?

A. Central Vermont.

Q. On the 11th day of January, at White River Junction, Vt., what were you doing, what train were you brakeman on?

A. On extra 708.

Q. Which brakeman were you, forward or rear?

A. Forward brakeman.

Q. Now, this extra 708, do you recall how many cars there was in it?

A. I don't just remember, but I think it was 33 or 34 cars.
A. About how many loads
A. It was 12, I think.
Q. What engine was on that train?
A. 708.
Q. What kind of an engine was that?
A. It was a compound.
Q. And high wheel or low wheel?
A. High wheel.
Q. Is that a faster engine than a low wheel engine?
A. Yes, Sir.
Q. Who were the other members of the train crew of 708?
A. Engineer McDonald and fireman, I don't remember his name.
Q. And do you remember the conductor and rear brakeman?
A. William Wright, the conductor. Arthur Taylor was the brakeman.

212 Q. Now, at White River Junction, what was the condition of this engine with reference to steam?
A. Well, she was leaking steam very bad.
Q. How badly?
A. Impossible to see by her.
Q. Impossible to see by her?
A. Yes.
Q. And what did you do there at White River Junction with reference to the switches, tell us what happened at White River Junction?
A. Well, the engineer informed me to get onto the pilot of the locomotive so — to line up the switches, because he couldn't see them.
Q. Why couldn't he see them?

(AMEY:) I object, hearsay evidence.
(COURT:) Well, he may answer that question and an exception — noted for the defendant.
Exception by defendant.

Q. I am not asking for anything he told you, you know; I am asking for the appearance that you saw yourself. Did you see yourself why he couldn't see them?
A. Yes, sir.
Q. Why was it then?
A. Escaping steam.
Q. Then what did you do?
A. I got onto the pilot and lined up the switches, as he told me.
Q. Where is the pilot?
A. In the front end of the locomotive.
Q. That is what we call the cow catcher?
A. Yes, sir.
Q. How far did you ride there?
A. I rode there until I got near my switches, and went and lined them up.

213 Q. Now, then after that what did you do?
A. Got onto the box cars and got on top and received the

high-ball from the rear brakeman, when the hind end pulled over the switch.

Q. Then where did you go?

A. Into the locomotive.

Q. What position did you occupy in the locomotive?

A. Fireman's seat.

Q. Which side of the engine is that on?

A. Left side.

Q. Who else was in the engine?

A. Fireman and engineer.

Q. Now, what did you observe about steam there in that engine, in the cab of that engine?

A. That was pretty dense, from the broken joints and stay-bolts in the cab.

Q. Was steam leaking from the fittings in the cab?

A. Yes.

Q. Could you see the engineer across the cab?

A. Well, hardly.

Q. And why?

A. The steam.

Q. Now as you sat there on the fireman's seat, did you look forward, look ahead?

A. Yes, sir.

Q. Could you see by the engine?

A. No, sir.

Q. Why?

A. For steam.

Q. Where did this steam come from?

A. Must have been in the steam chest and piston rods.

Q. And what kind of a night was it?

A. Clear, cold night.

Q. Did that condition continue all the way from White River Junction to the accident?

A. It did.

Q. Now, when you went out of Randolph that night and up to the time that you hit the rear end of 401, were you able at
214 any time to see the tail lights of 401?

A. No, sir.

Q. Why not?

A. For steam.

Q. What kind of atmosphere was it, whether moonlight or not?

A. It was moonlight.

Q. Was that condition of steam at White River Junction the subject of comment by Engineer McDonald to you?

Objected to. Question Excluded.

Exception by plaintiff.

(W. AUSTIN:) Now, these times I am going to show by the train sheet. I won't take the time of this witness to show the passage of this train along its route from White River Junction to the place of the accident.

(COURT:) Do you object to his showing it by this witness, Mr. Amey?

(AMEY:) We think the train sheet is the best evidence.

(COURT:) Very well, proceed then.

Q. Now, then, what was the first notice that you had of the presence of 401 ahead of you?

A. Nothing until we hit something.

Q. Then what happened?

A. Well, there was a great crash, and I made my way to get out of things.

Q. How did you get out?

A. Through the window.

215 Q. And where did you land?

A. Landed on the ground amongst the wreckage.

Q. Was that window the fireman's seat?

A. Yes, sir.

Q. Tell the jury where that window is with reference to the seat, the fireman's seat?

A. Well, it is right on the side of the seat.

Q. And after you struck the ground there what was the first thing that you saw?

A. Saw a blaze of fire.

Q. What kind of a fire was it, describe it?

A. Well, started to blaze right up very quick and made a large fire in a very few minutes.

Q. What was burning?

A. It was a carload of pails, I don't know whether pine pails, it was some kind of pails, butter tubs.

Q. Was it a pretty hot fire?

A. It was a hot fire.

Q. Did you see Mr. White at that time?

A. I did not.

Q. When did you first discover his body?

A. Well, it was quite a little spell after that, I smelt something, I was on the left side looking for him, I was on the left side and I smelt something burning and I called Engineer McDonald's attention to it and he said it was due——

Q. That is all right, you need not tell what Mr. McDonald said to you, I just want you to go right to the point. Now, what did you see when you got there?

216 A. I couldn't see anything, that is, only just a little portion of what I thought was the body. There was quite a lot of fire in there yet.

(AMEY:) I want to except to that.

(W. AUSTIN:) I don't care to go into detail of that. I don't see why that should be exceptionable, though.

(COURT:) Do you want it struck out?

(W. AUSTIN:) Why, yes.

(COURT:) Strike it out.

Q. Did you ever, at some time after those trains struck, discover the remains of Mr. White?

(AMEY:) I want to object to that, because it is entirely incompetent and immaterial.

(COURT:) He may answer that by yes or no, and an exception may be noted for the defendant.

Exception by defendant.

A. Yes.

Q. And where were they?

Objected to. Question waived.

(AMEY:) I want to take an exception to asking the question.

(C. G. AUSTIN:) Well, then, we insist on the question.

(COURT:) No, he may have an exception to the asking of the question, if there is any ground in it, and an exception is noted.

Exception by defendant.

217 (C. G. AUSTIN:) We don't want it to appear that we are asking improper questions, because we waive these numerous exceptions. We insist that this is a perfectly proper question.

(COURT:) Well, if you want to receive it subject to their exception, but I understand that your associate didn't care to.

AMEY:) We make no question about the death of this man, and about the fact that he wa- killed there.

(COURT:) Well, it is struck out. We find as a fact that the question was asked in good faith.

Q. About what rate of speed were you going when you struck this train?

A. Oh, 22 to 24 miles an hour.

Q. And what did you do to the train when you hit it?

A. We telescoped the van, smashed into the hind end of the box car.

Q. How many places did you stop at on the way from White River Jct. to the scene of the accident?

A. Two.

Q. What were they?

A. West Hartford and Bethel.

Q. And did you meet some trains at West Hartford?

A. We did.

Q. What were they?

A. Extra 403 and No. 10, a passenger train.

Q. And why did you stop at Bethel?

A. Stopped there to take water and the order board was on, and I went up and got a time order on No. 6 passenger train.

218 Q. I show you paper marked "Pl'ff's G", what is that?

A. It is a 19 order.

Q. Is that the order that you received at Bethel?

A. I should judge it was.

Q. Who did you deliver that order to?

A. Engineer McDonald.

(Plaintiff's Ex. G. read to the jury.)

Q. Now, after the making of that order complete, what did your train do?

A. Proceeded.

Q. Do you recall whether you had received that order and made it complete before taking water, or after taking water?

A. They was taking water when I went up to get it. I couldn't say.

Q. And what did you have to do after that was made complete?

A. Deliver it to the engineer, walk from the station to the engine.

Q. How far was that?

A. Why, I should judge perhaps a couple of hundred feet.

Q. After it was delivered to the engineer, what then had to be done?

A. He read his orders and then proceeded.

Q. Now, with this order was there a clearance card for McDonald delivered to you?

A. Yes, sir.

Q. Do you remember what that contained?

A. I think it didn't contain anything on it, that is, have any report of any train ahead.

219 Q. That is to say, was there any notice to you in that clearance card, according to this rule 221 and Form-A, that the next train ahead was 401, and the time that it had left Bethel, was that in there?

(AMEY:) I object, because Rule 21 doesn't apply under the circumstances of this case. He must testify from recolection and not from the card itself.

(W. AUSTIN:) Well, I don't understand his objection. If he objects on the ground that the best evidence is the card itself, we will waive this question temporarily, but if he puts it on the ground that he stated first that it is immaterial and that 221 doesn't apply, I want to be heard, because we claim that the order board having been displayed as testified by this witness, for orders, and this train having been stopped there to receive orders, and this order No. 4 having been delivered, that thereupon this rule went into operation, and this operator was bound to notify, that engineer and that conductor of train 708, that train 401 was the next train ahead and that the time when it passed Bethel and if it had not yet arrived, as we expect it will appear, at Randolph, that they should have written in there according to that rule the words "not yet".

(AMEY:) I want to take an exception to that statement, because it isn't in accord with the rule or the law or the facts.

220 (COURT:) Well, you can have an exception, if you think it is worth anything.

Exception by defendant.

(COURT:) We will receive the evidence, if you desire, and an exception may be noted.

(W. AUSTIN:) Well, may I ask—do you stand on the ground that the card is the best evidence?

(AMEY:) I stand on the ground that I have stated in the presence of the Court. (Objection read.)

(W. AUSTIN:) Have you got the original card that was delivered to McDonald?

(AMEY:) I will waive that part of the objection now, and stand—I waive the part of the objection that relates to the clearance card being the best evidence, for the time being and stand on the rest of it.

(COURT:) An exception may be noted and he may make his answer.

Exception by defendant.

A. I don't think it was.

Q. Were you stopped at Randolph?

A. We was not.

Q. I want to ask you to tell us something you spoke of in your testimony a little while ago. You said you got out and got the high-ball from the rear brakeman at White River Jct. that everything was all right. Tell what that is, what is the high-ball as used in that connection.

221 A. It was a lantern swung in a vertical circle.

Q. Lantern swung in a vertical circle?

A. Yes, over head.

Q. It means a signal does it?

A. Yes.

Q. High-ball is a term that railroad boys have adopted for that?

A. Yes, sir.

Q. Was there an occasion during that trip, when as forward brakeman you were called upon to give another high-ball which ordinarily is given from the cab of the engine, to the rear brakeman?

A. Yes, sir.

Q. Where was that?

A. Randolph.

Q. And where did you actually give that high-ball from?

A. The tank of the engine.

Q. From the tank?

A. Yes.

Q. And why was that done?

A. Because I couldn't open the side window to do it.

Q. Well, was there another, where you went back to the middle of the train to give it?

A. White River Jct.

Q. And why was that?

A. On account of the smoke and steam.

Cross-examination by Mr. AMEY:

Q. You were making pretty good time with that engine that night, weren't you?

A. Fairly.

Q. Well, didn't you state that you were going somewhere between 20 and 25 miles an hour from Randolph, going north?

A. Yes, sir.

222 Q. That is up grade part of the way, isn't it?

A. Yes.

Q. You are not an engineer?

A. No, sir.

Q. And you are not a judge of machinery are you, you don't claim to be?

A. No, sir.

Q. Now, at White River Jct. you say you rode on the pilot?

A. I did.

Q. Do you usually ride in the cab when you are going to line up switches?

A. No, sir, not always.

Q. Well, don't you usually ride on the pilot when you are doing that?

A. It isn't customary, no.

Q. Not in the yard?

A. No, sir.

Q. You mean to say that when you are lining up switches, that you stay in the cab and every time you get out, you have to get down out of the cab to line up your switches, is that right?

A. Not every time, no, sir.

Q. Isn't it more convenient for you to be on the pilot in doing it?

A. Yes.

Q. Could you see things from the pilot that you couldn't see from the cab?

A. Yes, sir.

Q. Why was that?

A. Because there was no escaping steam ahead of me from the pilot.

Q. That was a very cold night wasn't it?

A. Yes, sir.

Q. Is it an extraordinary thing for steam to come out of an engine?

A. No, sir.

Q. So that on a cold night like that, you would expect some steam anyway, wouldn't you?

A. Why, yes.

223 Q. And isn't it a fact that on a cold night—that was a very cold night, wasn't it?

A. Yes, sir.

Q. How cold was it?

A. I should judge it was 20 to 25 below zero.

Q. On a very cold night, you may tell the jury, if steam shows up more plainly than it does on a warm night?

A. It does.

Q. Now did you see the steam escape, Mr. Russell, that night from the pistons?

A. Why, I should judge it was the pistons and valve stems.

Q. Well, did you take particular notice to see where it escaped from?

A. I did not.
Q. So you wouldn't tell the jury it came from any particular place, or more than one place, would you?
A. No.
Q. You have seen that steam escape from a locomotive before haven't you?
A. Yes, sir.
Q. And it isn't any extraordinary situation, is it, for steam to come out around an engine?
A. I don't know as it is.
Q. Now, you saw the order board at Bethel, from the engine?
A. I was on the ground when I saw it.
Q. You stopped there before you got off?
A. We stopped there and took water, and it is customary to look and see if the order board is right or wrong.
Q. And you were sitting while you were going up there, on the left hand side of the engine, as I understand it?
A. Yes, sir.
224 Q. And the order board was on the right hand side, wasn't it, as you go in?
A. Yes, sir.
Q. That is, the station is on the right hand side of the train as you come in?
A. Going north, yes, sir.
Q. Coming along up north as you were coming?
A. Yes, sir.
Q. And it is frequently the case that steam escapes from an engine around the piston, isn't it?
A. Why, not if they are packed properly, I don't think.
Q. Do you know about that?
A. Yes, I think I do.
Q. What, sir?
A. I think I do.
Q. Do you know about engines?
A. I have enquired some, and I know some about them.
Q. Well, you don't mean, you wouldn't tell the jury that it is infrequent that steam escapes from around the piston rods, pistons?
A. Why, no, it isn't infrequent.
Q. Sometimes more and sometimes less, isn't there?
A. Yes, sir.

Redirect examination by Mr. WARREN AUSTIN:

Q. Mr. Russell, you say that you might expect some steam to escape ordinarily, from an engine? What do you say whether a proper engine, an engine that isn't in a bad state of repair would leak such a volume of steam, as you saw that 708 leak the night of January 11th and 12th?

Objected to. Discussion. Question waived.

225 Q. I want you to describe that steam a little more. Describe how it looked around the engine there and in the cab, all about it.

A. Well, it was an im-ense cloud of steam, that is all I could say about it.

Q. Did the cloud surround the engine?

A. It did.

Q. Was there other steam than the steam that went out of the smoke stack that trailed behind your train, other steam around the sides and in the cab of the engine?

A. There was.

Q. How long have you worked as a fireman?

A. A little over two years *in* the C. P. R. and pretty near a year on the C. V.

Q. Well, where is the place that the builder of an engine designs to have the steam come out of?

A. Exhaust nozzle.

Q. Where does that nozzle point to?

A. Smoke-stack.

Q. Is there any other place on the engine that the steam is intended to escape from except the escape valves?

A. No.

Q. And isn't it true that when a manufacturer makes an engine the design is to prevent the escape of steam from any other places except these?

Objected to. Question waived.

Q. Well, now, from your experience as an engine man and as a fireman on an engine, what do you say whether it is safe to run an engine when you can't see by it looking ahead?

A. I don't consider it safe.

226 Q. And does it make any difference whether it is a wall of stone or a wall of steam that prevents your looking ahead?

A. Isn't practically much difference.

Q. That water tank at Bethel, where is that with reference to the station, south or north?

A. South.

Q. Then you arrived at the tank before you arrived at the station of Bethel?

A. Yes, sir.

Q. And your engine stopped there?

A. Yes, sir.

Recross-examination by Mr. AMEY:

Q. You were on the lookout all the way, weren't you, from White River Jct. up?

A. Lookout, what do you mean by that?

Q. Were you on the lookout all the way from White River Jct., up to the place of the accident?

A. Naturally, as much as I could see, yes.

Q. Well, you were trying to look out, weren't you?
A. Yes, sir.
Q. Isn't it a matter of fact that steam comes out of an engine every time the piston moves?
A. Yes, sir.
Q. And isn't it a fact there are other places besides the stack where it is proper for steam to escape?
A. Yes, sir.
Q. And where are those places?
A. Cylinder cocks.
Q. Are there more than two places where it is proper for steam to escape, can't you think of any other? Do you know what
227 is called the pop valves?
A. Saddle cocks.
Q. Pop valves?
A. Yes, sir.
Q. Don't steam come out of those?
A. Yes, sir.
Q. It comes out from the side of the piston and it comes out of the cylinder cocks and comes out of the stack—all those places, doesn't it?
A. Yes, sir.
Q. Now, you and the engineer were both on the lookout from White River Jct. up?
—. Yes, sir.
Q. I suppose you ran across during your trip there, didn't you, various switches and signals?
A. Yes.
Q. Between White River Jct. and the place of the accident?
A. Run up against switches all right.
Q. You came across switches at how many different places?
A. Four, I think it is.
Q. You came by West Hartford, didn't you?
A. Yes, sir.
Q. There are switches there?
A. Yes, sir.
Q. You came by Sharon, didn't you?
A. Yes, sir.
Q. You came by South Royalton, and there are switches there, ar-n't there?
A. Yes, sir.
Q. You came by Royalton and there are switches at that place?
A. Yes, sir.
Q. You say that there are switches at all those places I mentioned?
A. There is.
Q. And are there switches at Bethel?
A. There is.
228 Q. There are switches at Randolph?
A. There is.
Q. Are there switches anywhere else, up and down?
A. I don't recollect of any.

Q. Now how many switches are there at Hartford leading off from the main line?
A. I couldn't tell you the exact number.
Q. More than one?
A. There is two, certain.
Q. And ar-n't there more than two leading off the main line at West Hartford?
A. I can't tell as to that.
Q. And at Hartford aren't there more than two?
A. I couldn't swear to it.
Q. You said there were two at West Hartford?
A. Certainly.
Q. And how many are there at Hartford?
A. I couldn't swear to how many there is there.
Q. You are not sure about the number of switches leading off the main line at Hartford and West Hartford?
A. No, sir.
Q. What about Sharon, are there switches leading off the main line at Sharon?
A. There is.
Q. How many switches?
A. I think there is three.
Q. And are there switches leading off the main line at South Royalton?
A. There is.
Q. How many should you say?
A. I couldn't state for sure, but I think it is three there.
Q. Well, are there switches leading off the main line at Royalton?
A. There is I believe, I think there is.
Q. Do you know how many?
A. I do not.
Q. And are there switches leading off the main line at Bethel?
229 A. There is.
Q. How many should you say?
A. I couldn't say, I couldn't state the exact number there.
Q. More than four there, aren't there?
A. There is four any way.
Q. At Randolph how many switches are there leading off the main line?
A. I couldn't swear to the exact number of them.
Q. Aren't there three or four switches there?
A. There is.
Q. Now, you passed, as I take it, some 20 or 25 switches coming from White River Jct. north to the scene of the accident leading off the main line, is that correct?
A. I think it is.
Q. Is there anything on those switches that indicate to the train coming whether the switch is open or closed?
A. There is.

Q. And what are on those switches in the day time to indicate that?

A. There is a signal board.

Q. Target?

A. Target.

Q. Call it a target don't you?

A. Yes, sir.

Q. And by night?

A. There is a light.

Q. You say there is a light at night?

A. Yes, sir.

Q. And if the switch is closed so that you can pass on the main line, what is the color of the light?

A. Green.

Q. And if the switch is open, which would take you in onto a siding or passing track, what is the color of the light?

230 A. Red.

Q. Which is the more observable at night, a green light or a red light, which is more easily seen?

A. Red light.

Q. Now, Sir, under the rules of operation, you would have no right to pass any of those switches without knowing whether they were open or closed, would you?

A. No, sir.

Q. And some of those switches are on the left and some on the right, coming up through aren't they?

A. Yes, sir.

Q. You may tell me the switches that are on the left coming up from White River Jct. to the scene of the accident, at what stations the switches from the main line are on the left?

A. I couldn't tell you, I am not acquainted well enough with the road.

Q. You think there are some of them on the left?

A. Yes, there must be.

Q. Now, when you went over those switches, or before you want over them, you had to see those lights, didn't you?

A. The engineer did.

Q. And he was sitting in the cab, on the opposite side from you, wasn't he?

A. Yes, sir.

Q. Now, you went right along and passed some of those stations without stopping, didn't you?

A. Yes, sir.

Q. Now, he had to see those lights before he went past the switches, didn't he?

A. Well, I couldn't swear that he see them.

231 Q. Supposed to?

A. Supposed to.

Q. If they were on your side, you had to see them, didn't you?

A. I don't know whether I was supposed to or not.

Q. You didn't did you?

A. No, sir.
Q. Were there any of those switches turned off the main line?
A. They couldn't have been.
Q. Now, you don't pretend to tell this jury that there was so much steam in that cab that you couldn't see the engineer on the opposite side, do you?
A. I do, at times.
Q. All the way up through there?
A. At times, yes, sir.
Q. So you couldn't see him? Did you have a light in that cab?
A. Nothing only our lanterns.
Q. And you couldn't see him even with a lantern?
A. No, sir.
Q. You mean to tell this jury that?
A. Yes, sir.
Q. But still the engineer could see the switch lights?
A. I couldn't swear that he did.
Q. Well, it was his duty to see them, wasn't it?
A. Yes, sir.
Q. Would the engineer have any right to pass a single switch, between White River Jct. and the scene of the accident without seeing the light, I mean the switch light?
A. I don't suppose he would.
Q. Well, don't you know about that?
A. No, sir, I don't.
Q. Don't you know, you have railroaded for three or four years and don't know about that?
A. No, sir.
232 Q. So that you wouldn't know, you wouldn't watch out for a switch light—if you were fireman or engineer on a train you wouldn't look out for it at all, would you?
A. Yes.
Q. Well, then, if you were on the engine you wouldn't pass any one of those switches without knowing whether it was green or red, would you?
A. I shouldn't calculate to, no.
Q. And if you did that without observing, your train would be in great danger, wouldn't it?
A. Yes, sir.

Redirect examination by Mr. WARREN AUSTIN (2):

Q. Now, these places other than the smoke stack where steam ought to escape from an engine, the cylinder cocks for example, have to be opened, don't they, in order to let the steam escape?
A. They do.
Q. And if steam escapes without their being operated, the engine is defective in that regard, isn't it?
A. Yes, sir.
Q. And the pop valve that won't escape steam? if it is in proper

condition, will it? unless the pressure in the boiler arrives at that point where it is designed to escape?

A. No, sir.

233 F. J. STORMS, called by plaintiff, sworn.

Direct examination by Mr. WARREN AUSTIN:

Q. You live here in St. Albans?

A. Yes, sir.

Q. And your business, please?

A. Train despatcher.

Q. For the Central Vermont Railroad?

A. Yes, sir.

Q. How long have you been their train despatcher?

A. About seven years.

Q. So that on January 11th and 12th, you were train despatcher for this Company 1912?

A. Yes, sir.

Q. Now, is there something, some record that you keep in your office as a train despatcher, of the operation of trains over the road under your charge?

A. Yes, sir.

Q. What do you call that?

A. Train sheet.

Q. And have you the train sheet there for January 11th and January 12th?

A. Yes, sir.

Q. Let me have them marked, please. I show you these papers marked "Pl'ff's Ex. I" and "Pl'ff's Ex. H." and ask you what they are, the papers?

A. Train sheets.

Q. For those two days are they?

A. Yes, sir.

Q. Now, what does a train sheet show?

A. It shows the time of all trains on the road at all the stations where they have open telegraph offices.

Q. Does it record other events and circumstances?

A. Yes, sir.

Q. What other events and circumstances are recorded in the train sheets?

234 A. All delays and accidents of any kind, anything out of the ordinary.

Q. And temperature?

A. Yes, sir.

Q. And does it record the orders that are given?

A. No, the train sheet doesn't show the orders. The orders are kept on a separate sheet.

Q. Does the train sheet show the make up of the train?

A. That is the cars?

Q. The cars?

A. Yes, sir.
Q. And does it show the engines on the trains?
A. Yes, sir.
Q. How are these engines designated?
A. By their numbers.
Q. Each engine bears the number it is known by, does it?
A. Yes, number of its own.
Q. And in designating a train how do you designate the train?
A. Well, extra or regular trains.
Q. If you have several extras, how do you designate the difference between them?
A. Well, by the engine number.
Q. So that a train drawn by engine 401 is called?
A. Extra 401.
Q. An extra train having the engine 708 is called?
A. Extra 708.
Q. Now, the passenger trains, regular passenger trains, have a schedule, do they not?
A. Have a schedule and a number.
Q. Does the train sheet show this schedule?
A. No, it doesn't show the schedule, it shows the time they leave the different stations.
235 Q. Does it show their arrival?
A. Arrival and leaving time at all stations.
Q. Now, when an extra freight train makes a stop at a station where there is an operator in connection with your office, does the train sheet show the time of stopping, arrival and departure of that extra?
A. Yes, sir.
Q. Now, when there is a regular what does the train sheet show regarding that?
A. Well, there is a notation made on the sheet showing all the particulars as they are given to us.
Q. Now, are these train sheets kept currently with the events that they are intended to record?
A. Yes, sir.
Q. And I suppose the effort is made on your part to have them record accurately all of the things that appear on them?
A. Yes, sir.
Q. And are these two train sheets accurate in respect of the information that was conveyed to your office as train despatcher of the day, on those two days, the 11th and 12th of January, 1912?
A. Yes, sir, as the facts were given to me.
Q. I suppose that all operators on the main line of the Central Vermont Railway Company are under your supervision and direction as train despatcher, are they?
A. Yes, sir.
Q. And the movement of all trains is under your supervision?
A. Yes, sir.
Q. Did you make those two exhibits H. and I yourself, in your own handwriting?

A. I don't understand. Outside of the sheet you mean?

236 Q. No, the face of them is all in your handwriting?

A. No, there is three different despatchers use the sheets.

Q. And what is recorded there with reference to trains 401 and 708, in whose handwriting is that?

A. 401 was entered on the sheet by Mr. Groom who was working at that time, at the hours that left White River Jct. 708 was put on by myself.

Q. And up to what time did Mr. Groom make the entries?

A. Up to nine o'clock P. M. on January the 11th.

Q. And from nine o'clock P. M. the 11th, until the time of the accident all that appears there is in your handwriting, is it?

A. Yes, sir.

Q. Where do you obtain the information regarding movements of trains that you record on those sheets?

A. From the operators at the several stations.

Q. (W. AUSTIN:) Now I would like to introduce these two train sheets in evidence.

(C. G. AUSTIN:) So far as they relate to those two trains.

(AMEY:) I haven't any objections to those.

(Plaintiff's Exhibits H. and I received.)

Q. 708 in this column, White River Jct. in the center, 10.12—10.12 representing the leaving time?

A. Yes, sir.

Q. Now, at West Hartford, Mr. Storms, there doesn't appear to be any time entered there?

A. No, West Hartford and Sharon are closed up at that time.

Q. And that is why you have no record of the stop of 708 on this train sheet?

A. Yes, sir.

237 Q. But do you know that certain orders were given to 708 to meet 403 and No. 10 at West Hartford?

A. I know they had orders to meet 708 there, and of course No. 10,—they made that point on their own hook, cleared No. 10 schedule.

Q. And about what time did No. 10 get there at West Hartford?

A. About 11.10 or fifteen.

Q. So that 708 didn't leave West Hartford until 11.10 or fifteen?

—. That is as near as we can get it.

Q. Then 12.08 appears on here against South Royalton. Now there is only one time given in that place, what does that indicate?

A. Indicates that the train passed without stopping.

Q. And you got a report from that operator that the train passed there at 12.08?

A. Yes, sir.

Q. Now, there is no time stated in Royalton?

A. That was also closed.

Q. Now we come to Bethel and there appears 12.30 and 12,36 there, what is that?

A. It is the arriving and leaving time.

Q. And next is Randolph? only one time given there?
A. That is the passing time.
Q. That indicates they didn't stop there?
A. Yes, sir.
Q. And one o'clock is stated here for that time?
A. The time that they passed Randolph.
Q. Now take 401 which is the next column. 401, I notice six o'clock is the time stated against White River Jct., no time
238 appearing again until South Royalton when 9.20 and 11 o'clock appear—what does that mean?
A. It is the arriving and leaving time.
Q. Now, you know, do you, that 401 had an order to meet 403 there at So. Royalton instead of Bethel, do you?
A. I heard you read the order this forenoon. I wouldn't want to swear to that, until I saw the order. If you will show me the order.
Q. I show you paper marked "Pl'ff's Exs. D. and E"—Do you know what they are?
A. Yes, sir, 31 train order.
Q. And are they in your handwriting?
A. These copies are in my handwriting, yes sir.
Q. You made those copies, then, of course?
A. I made those at the time of the public hearing, yes, sir.
Q. And are they true copies of the original entries?
A. Yes, sir.
Q. And this "Ex. C." is a true copy of the original order that it purports to be a copy of?
A. Yes, sir.
Q. Did you make it yourself?
A. Yes, sir.
Q. I think I will have you identify these three copies marked "J, K and L"—are these true copies of the original orders on file in your office?
A. Yes, sir.
Q. I call your attention to train order No. 4—is that the one you have in your hand? Now I show you "Pl'ff's Ex. G" for com-
239 parison, and ask you if the address in the copy is exactly like the address on the original order?
A. I don't see any change in the address with the exception of Vermont after Bethel.
Q. This is 708 only?
A. This is 401 and Randolph, and 708 and Bethel. It is all the same order, but made at one copy.
Q. Yes, so that the order that went to 708 was addressed only to 708?
A. At Bethel, but 401 got the same thing at Randolph.
Q. And 401 got an order addressed to 401 at Randolph?
A. Yes, but I just put it all on here with the two addresses.
Q. Your record contains both addresses on the same sheet because it is the same order?
A. The same order.
Q. Now, after examining those copies what do you say, Mr.

Storms, whether 401 had an order to meet 403 at South Royalton, and whether it met No. 10 there?

A. Yes, sir.

Q. So that this time here of 9.20 to 11 o'clock represents the time that train 401 was there at South Royalton?

A. Yes, sir.

Q. Now, the next station above South Royalton is Royalton, and nothing appears there?

—. No, that office was closed. A non-telegraph office anyway.

Q. Now, we come to Bethel. There appears here 11.52 and 12.15, what does that mean?

A. Arriving and leaving time.

240 Q. Then Randolph 12.50 and 12.54, that arriving and leaving time?

A. Arriving and leaving time.

Q. Now, here is the weather report, "clear" and the different times of the day, clear at Windsor 10. A — what does that mean?

A. 10 above. Now the weather report of the morning of the 12th will be on this other sheet. This is midnight of the morning of the 11th.

Q. What was the temperature and weather at midnight of the 11th?

A. Well, midnight of the 11th or the morning of the 12th is over here. That would be midnight of the 11th or morning of the 12th, five above South Royalton, five above; Waterbury five below—Waterbury six below; Essex five below, five below at all places except Waterbury was six.

Q. Was it five below here at St. Albans?

A. We don't take it at St. Albans, just those points here.

Q. And it was clear at all those places?

A. The way it was given to me, yes sir, it was clear.

Q. Now I call your attention to this notation 401 and 408 what is this 1.07 A. M.?

A. That is the time of the accident.

Q. Oh, 1.07 A. M.

A. Yes, sir.

(W. AUSTIN to the jury-) "Extra 708 north ran into rear end of extra 401 two and one-half miles north of Randolph derailing and wrecking several cars and engine 708. Wreckage caught

241 fire and burned several cars on top of extra 708. Brakeman E. L. White of extra 401 missing. Extra 401 claims running 15 miles per hour when overtaken."

Q. Do these sheets show how many loads and how many empties were on each train?

A. Yes, sir

Q. Will you please tell what the make up of both trains was?

A. Extra 401 had 18 loads and 16 empties.

Q. And Extra 708?

A. Had 12 loads and 22 empties.

Q. Now, does the despatcher know what kind of engine is on these trains?

A. Well, we know what engines are on, I don't quite get your meaning of what kind.

Q. Did you know, then, that 401 was a low wheel compound engine?

A. Yes, sir.

Q. And that 708 was a high wheel compound engine?

A. Yes, sir.

Q. And did you know that 708 was the engine used for hauling the fast 92 Chicago freight?

A. It had been for quite a few trips.

Q. And that 401 was a slower engine?

A. Yes, sir.

Q. Now, when there are conditions of atmosphere or weather that render the movement of trains more dangerous by reason of that condition of atmosphere or temperature, what is your duty as a despatcher?

A. Why, the despatcher, nothing as far as the despatcher is concerned, of the trains following each other.

242 Q. Isn't the despatcher required by the rules of the Company to exercise care commensurate with these dangers?

A. If there is anything that is out of *in* accordance with the rules, if there is anything out of the ordinary of the rules we might take it up.

Q. Supposing that for any reason of weather the vision of an engineer is obstructed and he is prevented from seeing ahead the movement of trains, isn't it your duty to take precautions to protect such a train?

A. If I was advised of anything of that effect I would.

Q. And did you know on the 11th and 12th of January that a temperature of five degrees below zero would increase the amount of steam that appears around an engine?

A. Why, no more than it would any time at that time of year.

Q. You think that is so from your experience as a railroad man?

A. Yes, sir.

Q. More than would appear on the Fourth of July?

A. Why, yes, more than the Fourth of July, of course.

Q. But, there isn't anything about five degrees below zero to render the movement of trains impossible by reason of not seeing, is there?

A. I never knew of anything of that kind, no sir.

Q. And it is absolutely necessary in order to have that condition of affairs that the engine leak steam in great quantities?

243 (AMEY:) Now I object to that, no proper basis for it at all.

(COURT:) I am hardly inclined to think that he is qualified sufficiently to express an opinion with reference to the matter. I haven't talked with my associates.

(W. AUSTIN:) All right, your Honor.

Q. Now, Mr. Storms, where the rules speak that "in case of fog

or severe storms liable to affect the movement of trains, track or bridges, the chief despatcher must be promptly notified that he may take precautions for safety of trains." That rule has meaning and force, doesn't it?

A. Yes, sir.

Q. And its object is not only to facilitate the movement of trains but to ensure safety?

A. Yes, sir.

Q. And does it make any difference whether that fog is created by purely natural causes or whether it is created wholly by artificial causes?

A. Objected to. Question waived.

Q. Does it make any difference whether that fog is created by wholly natural causes, or by natural and artificial causes combined?

Objected to. Discussion. Question waived.

Q. Now, Mr. Storms, when the rules of the company do not ensure safety, when by following to the letter and spirit the rules of
244 the Company life is put in danger, what is the duty of a despatcher?

(AMEY:) I object to it, on the ground that it is incompetent, immaterial and irrelevant.

(W. AUSTIN:) Waive it.

(AMEY:) I take an exception to the asking of the question.

(COURT:) Well, you may have an exception, but that is a new idea to the Court.

(AMEY:) That is adjudicated, if your Honor please, in Clark vs. The Employers Liability Co., that very proposition.

(COURT:) That a question asked, if it is asked in good faith is ground of exception? We give you one if you want it.

(AMEY:) I would like an exception.

(W. AUSTIN:) Does the Court have any doubt that I have asked that question in good faith?

(COURT:) Why, we think the question was asked in good faith and so find as a fact.

(Exception by defendant.)

Q. Now, then, I will ask you about your practice, what you have done as a train despatcher of this defendant Company when you have found that the rules of the Company were not adequate to protect human life—I want to know whether you have abided by those rules or whether you have departed from them as a prudent man.

245 (AMEY:) I want to object to that on the ground that it is incompetent, irrelevant and immaterial.

(COURT:) We have charged in reference to those matters as a matter of law — we did in the other case. If you want to receive an answer to it——

(W. AUSTIN:) Not subject to exception.

(AMEY:) I want an exception to the asking of the question.

(COURT:) Well, you may have an exception to the asking of the question.

Exception by defendant.

(W. AUSTIN:) I don't know but I shall have to insist upon my question if I am going to be put in an attitude of exception anyway. I am trying to get along, if possible, without exceptions.

Q. Mr. Storms, did you send any order to 708 regarding 401 on the night of the 11th or the morning of the 12th of January?

A. (AMEY:) Same objection.

(COURT:) We will receive an answer to that question.

Exception by defendant.

A. No, sir.

Q. Did you send any order to 401 on that occasion with reference to 708.

Exception by defendant.

A. No, sir.

246 Q. Is there any rule in the Company's book of rules, or anywhere, special instructions or directions that the Company have promulgated to you, that requires you as a train despatcher to give notice to either of two extra freight trains running in the same direction on the same line of track, of the whereabouts and speed of the other?

A. No, sir.

Q. Now, as a despatcher superintending the movement of trains are you acquainted with the position of the trains on that line of railroad in your command?

A. Yes, sir, at most of the times—not the point.

Q. And these two trains here 401 and 708, were you then on the 11th and 12th of January, acquainted with the positions of those two trains as they proceeded north from White River Jct. to the scene of the accident?

A. I were as fast as I got the reports from the different offices.

Q. And how fast was that?

A. Well, I couldn't remember now, it is too far, too long ago.

Q. Was it practically simultaneously with the movement of the train into the station and out of the station from which it was reported?

A. I don't understand that question.

Q. Was it practically simultaneously with the arrival of the train at the station and its departure?

A. I don't get your meaning now.

Q. When 708 arrived at Bethel did you get a report of its arrival right away?

A. I couldn't say as to that now.

Q. Are you expected to have that report?

A. Not necessarily.

247 Q. Isn't there any rule provided by this Company for the immediate notification of the train despatcher of the arrival of the train at the station?

A. There may be some such rule in the book, but it isn't required—if it isn't required right off quick it isn't necessary to take it for a few minutes.

Q. What does the word "promptly" mean in the rules of the Central Vermont Railway Company?

A. It means just what it says——

Q. Usual meaning is adopted by the railroad company is it not?

A. Means "promptly" just what it says, but it wouldn't mean to stop in the middle of some other order to simply take that.

Q. Well, then, do you mean to have us understand that unless the operator at a station is taking an order and the line is engaged for that purpose, that it is his duty to report immediately the arrival of a train at a station?

A. Yes, sir, unless the despatcher is busy with some other offices sending or receiving orders; of course, in that case he would wait until I got through.

Q. And if the line is so busy, then as soon as it is relieved of that business, what must he do?

A. Supposed to report.

Q. And is that true also of the departure of a train from a station?

A. Yes, sir.

Q. And when you say that you do not remember whether these reports came to you immediately after the arrival of these two trains at their respective stopping points on this line that night, you mean that you have no independent recollection, do you?

A. I can't remember now, no, sir.

248 Q. If you followed your train sheet, used that to refresh your recollection, what would you say about it?

A. I Couldn't say now. We take hundreds of those train reports every day, it would be hard to remember one of them.

Q. Well, then, if an operator does not report the arrival and departure of trains when that train action takes place, the information that you get from that operator is purely a matter of memory with him, is it?

A. No, he records it on a sheet that he has for that purpose.

Q. So that what you get over the telephone is an accurate statement, is it, of the time of arrival and departure?

A. Supposed to be, yes, sir.

Q. And you get it just as soon as the line is clear for it?

A. Usually.

Q. And that is true of all trains under your direction?

A. Yes, sir.

Q. What lines, what part of the road, what division did you cover on the 11th and 12th of January, 1912?

A. From St. Albans to Windsor.

Q. And that includes White River Jct. to Braintree?

A. Yes, sir.

249 Cross-examination by Mr. AMEY:

Q. Mr. Storms, I wish you would take those sheets and refreshing your recollection from them, tell me what time that 401 left White River Jct. that night?

A. The train sheet shows that they left there at six o'clock P. M.
Q. And what was the first stop.
A. Well, all that is shown on the sheet is South Royalton at 9.20.
Q. What time did they leave there?
A. Left there at 11 o'clock.
Q. When is the next stop, where was the next stop?
A. Bethel.
Q. When did it arrive there?
A. 11.52.
Q. When did they leave there?
A. 12.15.
Q. Where was the next stop, Mr. Storms.
A. Randolph.
Q. When did it arrive there?
A. 12.50.
Q. When did it leave there?
A. 12.54.
Q. Take 708 and tell me when it left White River Jct. that night?
A. 10.12.
Q. What was its first stop.
A. West Hartford.
Q. When did it arrive there?
A. I can't say as to that, for the office was closed.
Q. And where is the first office at which you have a record?
A. South Royalton.
Q. What time did 708 arrive at South Royalton?
A. It passed there at 12.08 A. M.
Q. Did not stop?
A. No, sir.
Q. And where was the next stop of 708 that night?
250 A. At Bethel.
Q. This would be the morning of the 12th wouldn't it?
A. Yes, sir.
Q. What time did 708 arrive there?
A. 12.30.
Q. What time did it leave there?
A. 12.36.
Q. What time did 708 pass Randolph that morning?
—. At one o'clock.
Q. Now, you speak about low wheel engines—sometimes use them on manifest trains, don't you?
A. Certainly, very often.
Q. Those trains are capable of considerable speed?
A. I don't think there is much difference in the speed, may be a little.
Q. They are built for strength, aren't they, Mr. Storms?
A. More for strength than for speed, although I don't see much difference in their running.
Q. And as a matter of observation in the management of your business, do you note that they get over the road pretty well generally?

A. Very well, yes, sir.

Q. Now, you said extra 401, it says on that sheet "claimed running 15 miles per hour"—that wasn't a fact that you knew yourself, was it?

A. No, this notation that I have on the sheet was made from what was told me verbally over the telephone before I saw the corrected reports.

Q. And do you know who that came from, who that message came from?

A. I think from the operator at Randolph, I couldn't say which one it was now.

251 Q. The operator at Randolph was not up there, of course?

A. The fellow that went off from duty went up there and the *the* fellow that came on——

Q. I mean at the time the collision took place?

A. Oh, no, not at the time of the accident.

Redirect examination by Mr. W. AUSTIN:

Q. Isn't it a principle familiar to any person who knows physics at all that with the increase of the diameter of the wheel of any vehicle you can gain speed?

A. Oh, certainly.

Q. And isn't it true that in decreasing the diameter of a wheel of any vehicle, you decrease the speed?

A. Yes, you would in that way, but with a compound engine I don't think there is a great deal—they will go about so fast and not much faster—some, there is a little. I am not mechanic enough to say how much.

Q. Well, speed of any engine depends somewhat on the size of the wheel somewhat, doesn't it?

A. Certainly.

Q. And the velocity of the piston?

A. Yes, sir.

Q. And pressure of energy, doesn't it?

A. Yes, sir.

Q. I noticed that you testified on cross examination that 401's first stop was South Royalton, I call your attention to "Pl'ff's Ex. C." and ask you if that doesn't satisfy you that 401 was detained at West Hartford to meet 336 and another train?

A. I said so far as the train sheet showed, I couldn't remember this order. Yes, sir, this order here, yes, now I see the order,

252 that would be their stop, but I was just going from the sheet.

Q. Yes, Well I thought so, Mr. Storms. Those were both extras, were they not?

A. Yes, sir.

Q. And so your train sheet doesn't show what time they arrived at West Hartford?

A. No, sir.

Q. And have you no knowledge how long they were obliged to wait in order to fulfil this order?

A. No, it would be hard to say now.

Q. Waiting is just as much a part of fulfilling an order of this kind as running on the road, isn't it?
A. What is that, again?
Q. Waiting by a freight train holding an order to meet, is just as much a part of the execution of that order as it is to run on the road, isn't it?
A. Why, certainly, if ordered to wait, they have to wait.

253 WILLIAM L. WRIGHT, called by plaintiff, sworn.

Direct examination by Mr. WARREN AUSTIN:

Q. You live here, Mr. Wright, in St. Albans?
A. Yes, sir.
Q. What is your present business?
A. I have been working for the Montreal Locomotive people.
Q. In January, 1912 were you employed by the defendant Company?
A. Yes, sir.
Q. As what?
A. Conductor.
Q. What train were you conductor on?
A. Extra 708.
Q. How long have you been a conductor?
A. 18 years. Since 1900 conductor.
Q. How long have you been railroading?
A. Since 1892, May, 1892.
Q. About 20 years?
A. Yes, sir.
Q. At White River Jct. did you receive this paper marked "Pl'ff's M"?
A. Yes, sir.
Q. And did you sign it yourself?
A. Yes, sir.
Q. Where is your signature on it?
A. At the bottom.
Q. Is there another signature under your signature?
A. Yes, sir.
Q. Whose signature is that?
A. That is Mr. McDonald's.
Q. Who is he?
A. Engineer.
Q. Engineer of 708?
A. Yes, sir.
Q. When did you receive that order?
A. On January 11th, 1912.
Q. And what is the time?
A. 9.54 P. M.
Q. Where have you kept that order since then?
A. In my possession.
254 Q. And what is that order?
A. Form 31.

Q. That your running order?
A. Movement order, yes, sir.
Q. Was that superseded or annulled?
A. No, sir.
Q. Was it fulfilled?
A. Yes, sir, to Randolph.
Q. Fulfilled until the wreck?
A. Accident, yes, sir.

Q. (Plaintiff's Ex. M offered and received.)

Q. Did you also receive these two papers marked "Pl'ff's Ex. N and O" at White River Jct.?
A. Yes, sir.
Q. What are those papers?
A. Slow orders.
Q. What is the occasion for giving any such orders?
A. For protection and precaution.
Q. Nothing in the rules about such matters, is there?
A. Well, I couldn't say as there is, no.

Q. (Mr. AUSTIN:) We offer these in connection with the testimony.
(Plaintiff's Exhibits N and O received and read to the jury.)

Q. Now, did you also at White River Jct. receive this paper marked "Pl'ff's Ex. P"?
A. Yes, sir.
Q. What is that?
A. That is a 19 order with time on a passenger train, No. 10.
Q. That means that it gives you a right over a superior train, does it?
A. No, sir.
Q. What does it mean?
A. We have a right to use the time as much later as the schedule shows in the time table.

(Plaintiff's Ex. P offered and received.)

255 Q. Are 19 orders always green?
A. Always green?
Q. Yes?
A. Why, I have seen them different shades.
Q. Now are these all the orders that you received at White River Jct. before starting out with 708 on this trip north?
A. Yes, sir.
Q. Did you receive a clearance card at that point?
A. Yes, sir.
Q. What is this paper marked "Pl'ff's Ex. Q"?
A. It is a clearance card with the number of orders that I received at White River Jct.

Q. (Plaintiff's Ex. Q offered and received in connection with the other orders.)

Q. The train sheet shows, you started out from White River Jct. at 10.12, did you meet No. 10 and extra 403 at West Hartford?
A. I did.
Q. About how long were you there?
A. Oh, I should think probably three or four minutes, I couldn't tell just exactly, not any length of time to amount to anything.
Q. And thence what was your run, to what point?
A. To Bethel.
Q. The first stop you made after West Hartford, then, was Bethel?
A. Yes, sir.
Q. And at Bethel did you receive an order?
A. Yes, sir.
Q. Is this "Pl'ff's Ex. G" the order?
A. Yes, sir.

256 (W. AUSTIN to jury:) This has been read to you, gentlemen, this 19 order giving time on No. 6. "Engines 211 and 214 extra wait at Montpelier Jct. till 1.15 A. M.", etc.

Q. Now, did you receive a clearance card at Bethel accompanying this order?
A. I did.
Q. Do you know where that is?
A. I could not say.
Q. Where was the last time that your saw it?
A. Between leaving Bethel, between Bethel and Randolph in my orders.
Q. Where was it then?
A. On the hook in the caboose.
Q. What happened to your caboose in that wreck?
A. Well, it was badly mixed up in the jam.
Q. And did you look for the clearance card?
A. Yes, sir.
Q. Where did you look?
A. On the hook and all over the caboose.
Q. Were you able to find it anywhere?
A. No, sir.
Q. Have you looked in your clothes that you wore that night?
A. Yes, sir.
Q. Have you been able to find that card?
A. No, sir.
Q. Do you think it is possible to find it?
A. I do not.
Q. Did McDonald your engineer receive such a card there?
A. Yes, sir.
Q. Have you talked with McDonald about his card?
A. Yes, sir.
Q. Has he recently told you that he had that card?
A. Yes, sir.

(At request of Mr. Austin, Mr. Amey produces card.)

Q. I show you "Pl'ff's — R," do you recognize that?
257 A. I should think that was a copy of it, yes, sir.

Q. ("Pl'ff's Ex. R" offered and received.)

"Pl'ff's Ex. R." "Central Vermont Railway Company Clearance Bethel, Vt., January 12, 1912. Train 708. I have orders 4 for your train. The next train ahead is blank, with a dash with the pencil in the blank. It left this station at blank, at blank. Signal is displayed for orders, and does not now affect you. Sherlock operator," etc.

Q. Now, having received this order No. 4 and a clearance card of which that is a copy, what did you do at Bethel?

A. After we got through taking water, proceeded.

Q. Now, this order I notice is made complete 12.38, and how long was it after that that you proceeded?

A. I should think just about that time if I remember right.

Q. Just about 12.38?

A. Yes, sir.

Q. Was there any stop made by you after you stopped at Bethel?

A. No, sir.

Q. Did you receive any other orders than these orders that I have shown you?

A. No, sir.

Q. Now, did you have any notice whatever that train 401 was ahead of you?

A. No, sir.

Q. Did you have any reason to believe that you were going to find a freight train on the track between Randolph and Braintree?

A. Did not.

Q. What rate of speed were you running?

A. Why, I should judge between 20 and 23 miles an hour.

258 Q. What was the condition of your engine with reference to steam?

A. It was leaking badly, the steam, escaping steam.

Q. Did you observe that yourself?

A. Yes, sir.

Q. And you were in charge of that train as conductor, were you not?

A. Yes, sir.

Q. Was report made to you by the engineer of that train of the leaking of the steam?

A. Yes, sir.

Q. What position did you occupy on the train?

A. Conductor.

Q. I mean, local, where were you on the train?

A. In the caboose.

Q. At the time when the accident happened what part of the caboose were you in?

—. The monitor.

Q. What is the monitor?

A. Well, it—I don't know whether I could tell you exactly, it is a sort of cupola on top of the car, the caboose car, where there are windows for observation.

Q. And you were up in this observation part of the car?

A. Yes, sir.
Q. What direction were you sitting?
A. Facing the engine, facing north.
Q. Could you see past the engine?
A. No, sir.
Q. Why not?
A. On account of smoke and steam.
Q. What kind of a night was this?
A. Clear.
Q. If it hadn't been for that steam could you have looked beyond the engine?
A. Could have been able to, yes, sir.
259 Q. Were you looking ahead when you struck that train?
A. Yes, sir.
Q. Did you see the tail lights of 401 at any time before you hit them?
A. I did not.
Q. Did you have any warning or notice of any kind whatever that 401 was ahead of you?
A. No, sir.
Q. For how long a speace is the track straight above Randolph and back from the scene of the accident?
A. Well, I should judge about a half a mile.
Q. So that if there were not some barrier like a cloud of smoke and steam an engineer or a conductor could have seen the tail lights of 401 a half a mile along the track?
A. Yes, sir.
Q. Can you stop a freight train in a half a mile?
A. Why, yes, ought to.
Q. Who were the other members of your crew besides McDonald and the fireman?
A. The two brakemen.
Q. And Strong was one of them?
A. I think he was the fireman.
Q. Was he the fireman?
A. I think so.
Q. What was the other brakeman's name?
A. A fellow by the name of Russell and Taylor.
Q. Russell has been here and testified; and Taylor—do you know where he is?
A. I do not.
Q. Do you know where Strong is?
A. I do not.
Q. Have you heard that Strong was dead?
A. I heard so, yes, sir.
Q. So that the only persons who were members of that
260 train crew who are available here in St. Albans now, are yourself, McDonald and Russell?
A. Yes, sir.
Q. Now you were sitting up there in the cupola, what happened, what was the first notice you had of 401?

A. The crash.

Q. Was there any checking of the speed of your train before the crash?

A. Yes, sir.

Q. What was it?

A. Well, not before the crash, it stopped immediately.

Q. And what became of you?

A. It threw me into the north end of the caboose, of the cupola of the caboose.

Q. And from there did you fall?

A. Onto the floor of the cupola. Yes, sir.

Q. What happened to your lights and your stove and other things in the car?

A. They were all out, the lights were.

Q. Then what happened?

A. I got down as quick as I could, as quick as possible and went to my desk and lit my light and also remarked to the flagman if he was hurt and he said no, only his wrist, he said was a little hurt, and I asked him if he was able to get back to Randolph and he said he was, so I told him to go back just as soon as possible and stay there until he heard from me.

Q. Did you look at your watch?

A. Yes, sir.

Q. And had all these things taken place before you looked at your watch?

A. Up to the time I lit the lamp, yes, sir.

Q. It was dark when you first picked yourself up there?

A. Yes, sir.

261 Q. And when you first looked at your watch what time was it?

Q. About 1.07.

Q. How long before that did this shock strike you?

A. Well, I don't know just exactly, probably a couple of minutes or such a matter.

Q. Now having done what you say you did there in the caboose, what did you next do?

A. After I got two lights lit and the tail lamps lit, I started for the head engine.

Q. What did you find up there?

A. I met Mr. McDonald the engineer and Mr. Gibbons coming back.

Q. And thereupon what did you do?

A. I asked them what was the matter, and Mr. McDonald said they were into 401 all over.

(Recess.)

Q. Did you go up to the scene of the wreck?

A. No, sir, not at first.

Q. After you had been to Randolph—I suppose you reported this matter from Randolph?

A. Yes, sir.

Q. Did you then go to the scene of the wreck?
A. Yes, sir.
Q. And describe the situation there, what you saw?
Q. Well, I saw our engine was in the rear end of 401 train and also a large fire and the cars burning.
Q. Did you see Mr. White's remains there?
A. Not until after they had been taken out.
Q. Now, what is the average rate of speed for an extra freight train?
262 A. The average rate is from 10 to 15 miles an hour.

Cross-examination by Mr. AMEY:

Q. What was your last answer, Mr. Wright?
A. From 10 to 15 miles an hour.
Q. What for, an extra freight train?
A. Yes, sir.
Q. Is that the maximum speed?
A. That is what it is figured, isn't it, averaging it.
Q. Well, you were running quite a lot faster than that that night, weren't you?
A. Yes, sir.
Q. How did you come to be exceeding the speed limit that night?
A. Well, because we happened to be going that way, that is all I know.
Q. You was in charge of the train wasn't you?
A. Yes, sir.
Q. And you made pretty good time for an engine that was leaking steam all over, didn't you?
—. Well, we was making fairly good time, yes sir.
Q. Wasn't that engine doing pretty good work that night, Mr. Wright?
A. It was doing fairly good work.
Q. It was hauling a fairly heavy load, wasn't it?
A. Well, I couldn't tell you the tonnage we had, sure, now.
Q. Well, you had how many cars on?
A. 35 all told.
Q. 35 cars?
A. Yes, sir.
Q. And you didn't have any helper anywhere along on that course?
A. No, sir.
263 Q. Didn't have any trouble about getting along twenty-three or four, twenty-four miles an hour, did you?
A. Well, I don't know about how fast we was going, I should state it at that, between twenty and twenty-three miles an hour, that is the best I could give you.
Q. Did you say the engineer reported the engine in bad condition to you?
A. Yes, sir.
Q. Did he report the engine to you leaking steam?
A. At the time of the wreck, yes, sir.

Q. What?
A. Yes, sir.
Q. At the time of the wreck?
A. Yes, sir.
Q. Well, it had gone into the hind end of the other train, then, hadn't it?
A. Yes, sir.
Q. But you never had anything of that sort called to your attention until that time, is that right?
A. No, sir.
Q. Now, you were sitting up in the dome of the caboose, wasn't you, the cupola?
A. Yes, sir, in the cupola.
Q. Looking ahead?
A. Yes, sir.
Q. And when you looked ahead, there was a cloud of steam in front of you?
A. Yes, sir.
Q. And that was practically all the way up through there, wasn't it?
A. Well, yes, sir.
Q. All the way from White River Junction to the scene of the wreck?
A. Yes, sir.
264 Q. The steam was right up in front of the cupola windows, wasn't it?
A. No, sir, not back to the cupola windows.
Q. Where was it?
A. Over the front end of the train.
Q. Well, it was a cloud of steam that you could see looking over the tops of the cars, wasn't it?
A. Yes, sir.
Q. I believe you gave a deposition, didn't you, one time in this case?
A. Yes, sir.
Q. And didn't — say it was coming back over the tops of the cars?
A. Yes, sir.
Q. And that is the truth of it, isn't it?
A. Yes, sir.
Q. So that prevented you from seeing ahead?
—. On a straight line, yes, sir.
Q. Now, I believe you have stated that you didn't encounter anything from White River Junction to the scene of the wreck that warned you of the location of the train ahead of you?
A. Not to my knowledge, no sir.
Q. You had nothing whatever, you observed nothing that indicated that you were in proximity to another train?
A. No, sir.
Q. Now, sir, if you were in proximity to another train ahead of you on that line, what would you expect to see?

A. Well, if they are stopped, if they didn't make their schedule why I should expect to find some danger signals of some description.
Q. Find what?
A. Danger signals.
265 Q. But extras don't travel on a schedule, do they?
A. No, sir.
Q. But there is an average time for extras, isn't there, I believe you have stated?
A. Well, I believe the schedule calls for ten miles an hour, isn't it?
Q. Well is there a schedule that calls for that?
A. That is what we are paid by.
Q. Well, is there a schedule that calls for ten miles an hour?
A. That is for the time.
Q. Is there anything in the rule book about that?
A. No, sir.
Q. And you make sometimes twenty or twenty-five don't you?
A. Yes, sir.
Q. And doesn't it depend upon the load and the kind of an engine you have and the weather?
A. Yes, sir, a great deal.
Q. Your point is, when you start out, to get over the road, as rapidly as you can with safety, isn't it?
A. That is the idea.
Q. That is the idea exactly. Now, then, you say you would expect in case of a delay of the train ahead, to note some sort of a signal, is that what you state?
A. Yes, sir.
Q. And what would that be, Mr. Wright?
A. Be a danger signal.
Q. What would that be, what is that?
A. Well, we have two.
Q. What are they?
A. Torpedoes and fusees, and also a flagman.
Q. You use the torpedoes and fusees by night?
A. Yes, sir, both.
Q. And you use the torpedoes and flagman by day, is that right?
A. Yes, sir.
266 Q. Now, sir, you have stated that you didn't see anything of that sort from White River Junction to the scene of the wreck?
A. I did not.
Q. And when the train is delayed, stops or is delayed on the main line, they put out those signals, don't they?

(Objected to. Discussion. Question admitted.)
Exception by plaintiff.

A. Yes, as a general rule.
Q. Does that apply to a situation where the trains are hung up on sidings and where the trains are heavily loaded, and making slow time on the track?

(Question withdrawn.)

Q. And supposing you are delayed on sidings, and after you get back on the main line, and a lot of time is lost, how do you protect your rear end?

(Objected to.)

(COURT:) That is hardly cross-examination. That we think, Mr. Amey, as has been suggested, it would be proper matter of defense, but we hardly think it is cross-examination or anything that came out in the direct examination. Now, you directly point to how *that* he should protect the rear end of his train. I am inclined to think that is not cross-examination.

(AMEY:) Well, inasmuch as the direct examination was
267 attempting to bring out the fact that we wer-n't exercising care, I thought I had a right to ask any question which would indicate that we were.

(COURT:) Well, do you wish to show, as you inquired, to show that you were using due caution in protecting the rear end of the train.

(AMEY:) I mean the Company, I don't mean the plaintiff.

(COURT:) I am inclined to think this is not cross-examination, and I will exclude it as such, but not exclude it as not being admissible when properly offered.

(AMEY:) Well, I would like to make an offer.

(COURT:) You don't have to on cross-examination, but you may make it, and we will hear the offer all the same.

(AMEY:) I think I have stated to the Court that this witness claims there was no warning whatever between White River Junction and the scene of the accident, and I am trying to find out from him what warning should be given, when the trains are in proximity.

(COURT:) Well, that would hardly be cross-examination. We will adhere to our ruling, we don't exclude the evidence as evidence in its proper time, but we simply exclude it at this time.

Exception by defendant.

Q. Now, when you stopped, ran into that train, Mr. Wright, you had with you in the caboose who besides yourself?
268 A. The rear brakeman.

Q. And what did he do immediately?

A. Went back to Randolph to stop all trains.

Q. Did he have torpedoes and fusees with him?

A. Yes, sir.

Q. Was that a part of his duty?

A. Yes, sir.

Q. What was he to do when he got back there to protect the rear, what was your flagman, to do?

A. Why, to hold all trains.

Q. Well, in what way would he hold them?

A. With a flag protection.

Q. Well, that was in the night. Would he do it with a Flag?

A. Well, he would do it with flagging material, torpedoes and fusees, he would also turn the order board, notify the despatcher.

Redirect examination by Mr. WARREN AUSTIN:

Q. How did he happen to go back?
A. By my directions.
Q. You had a wreck there that couldn't get off the track for hours, could it?
A. No, sir.

(PALMER:) That is objectionable.

Q. And now speaking about that steam, when did you first notice that steam escaping from the engine?
A. I noticed when they pulled by me at Bethel, had no conversation in regard to it.

269 E. J. MULDOON, called by plaintiff, sworn.

Direct examination by Mr. C. G. AUSTIN:

Q. Where do you reside?
A. St. Albans.
Q. What is your business?
A. Conductor.
Q. Conductor on the defendant railroad?
A. Yes, sir.
Q. How long have you been in the employ of the Central Vermont Railway?
A. Eight years.
Q. And how long have you been conductor?
A. Seven years.
Q. And still hold that position?
A. Yes, sir.
Q. Were you acquainted with Enoch L. White in his lifetime?
A. I was.
Q. Do you know his widow?
A. I do not.
Q. Were you acquainted with his habits and character?
A. I was.
Q. Did you ever work with him?
A. Yes, sir.
Q. In what capacity?
A. Well, he broke for me.
Q. How long did he act as brakeman under you on a train?
A. About six months.
Q. Now, Mr. Muldoon, I want to have you tell the jury what kind of a man, if you know, and you say you know, what kind of a man Mr. Enoch L. White was, that is, what kind of a man was he to work?
A. Well, Mr. White was a good, honest, reliable man, I could depend upon him in all ways.
270 Q. And was he a man faithful in work?
A. He was.
Q. And was he a capable man to work?

A. He was.
Q. What position did he occupy under you?
A. Flagman.
Q. Which end of the train?
A. Rear end of the train.
Q. Now, will you tell the jury what the responsibility of the rear flagman is, whether it is a responsible position or not?
A. Well, he has got to look out for the rear of the train.
Q. Why did you put him to the rear of your train as rear brakeman?
A. Well, I could depend on him.
Q. What were his habits as to sobriety and general conduct?
Q. He had good habits, was all right.
Q. And good conduct?
A. Yes, sir.
Q. At what time did you see Mr. White with reference to the time of the accident?
A. It was some time before, it was in 1910 that he was on with me.
Q. That he worked under you?
A. Yes.
Q. But did you see him subsequently and about the time of the wreck?
A. Shortly before the wreck.
Q. When was it?
A. I couldn't say just what date, but it was a short time before.
Q. Whether it was the night before?
A. No, I didn't see him.
Q. What train was he on then?
A. Well, I see him in St. Albans.
Q. Did you see him on any train?
A. No, sir.
Q. And you have been intimately acquainted with him since he broke for you in 1910 down to the time of his death?
271 A. No, I haven't met him.
Q. Well, you say you met him sometime?
A. Yes, I met him in St. Albans shortly before he had the wreck.

Cross-examination by Mr. AMEY:

Q. Were you running a freight train, Mr. Muldoon, when you had Mr. White as flagman?
A. Yes, sir.
Q. How long did you say he broke for you?
A. Six months.
Q. And where were you running a train then, your trains?
A. Brockville, White River Junction, and Montreal.
Q. And as a flagman, what were his duties?
A. To protect the train.
Q. What did he have to do to protect the train?
A. Well, it was his duty to look out for the rear of the train when we stopped.

Q. And what did he have to do to look out for the rear of the train in the night-time For instance?

A. He had to use his fusees and torpedoes.

Q. Do you mean that he had to go back and put torpedoes down on the track?

A. Yes, sir.

Q. And those torpedoes, do they explode when the following train runs over them?

A. Yes, sir, they do.

Q. Now, sir, what did he have to do with the fusees in going back in the night time?

A. Well, when he was called in, he had to leave one of them, he had to light one and leave it.

272 Q. If he had a high-ball?

A. When he was called in, he left a fusee.

Q. Well, you trusted him to do that?

A. I did.

Q. And he performed his duty faithfully in that regard?

A. He did.

Q. I believe that is the duty of a flagman, isn't it?

A. It is.

Q. And in the day time, what would he have to do in case you were losing time or making stops or anything of that sort to delay your progress, what would he have to do?

A. Well, he would have to go back and put down torpedoes.

Q. Did he ever have to use the flag, too?

A. Yes, sir.

Q. And what was that done, Mr. Muldoon, to prevent?

A. To prevent a train striking our rear.

Q. Now, then, he would do that at the rear end of the train, Mr. Muldoon?

A. Yes, sir.

Q. I think you so stated that before.

A. He would go back.

Q. You stated he had to go back and do that?

A. Yes.

Q. How far back would he have to go?

A. Well, a certain distance, I haven't got it right in my mind now, I can't tell you.

Q. That is in the rules, isn't it?

A. It is in the rule book, it states it there.

Q. And he would be expected to observe the rules in that respect?

A. He would.

273 Q. And that would be so with reference to flagging, wouldn't it?

A. Yes.

Q. Or putting down fusees?

A. And torpedoes, yes.

Redirect examination by Mr. C. G. AUSTIN:

Q. Then you found him always ready and willing to perform any such duty whenever required, did you?

A. I did.
Q. Never knew him to shrink from such a duty when called upon?
A. No, sir.
Q. And you never would expect him to do such a thing unless it was necessary to be done, would you?
A. No, sir.

Recross-examination by Mr. AMEY:

Q. Isn't it necessary to do that when the train stops on the main line.

(Objected to, question admitted.)

A. It is.

Redirect examination by Mr. C. G. AUSTIN (2):

Q. It would be necessary if they stopped on a side line, wouldn't it?
A. Well, not when they are on a siding, it wouldn't.
Q. If there was danger of their being struck and they knew that there was danger, then it would be necessary to protect, wouldn't it?
A. It would.
Q. And not otherwise?

274–277 A. When the train stops on the main line, or is delayed, and under the circumstances it may be overtaken by a following train, a flagman will go back a sufficient distance—he puts torpedoes on the rail.

Q. Well, that is the rule, isn't it?
A. That is the rule.
Q. And that is what they are expected to do?
A. Yes.
Q. They are not expected to do it unless there is some danger of their being overtaken?

(Objected to. Question withdrawn.)

* * * * * * *

278 D. R. BEEMAN, called by plaintiff, sworn.

Direct examination by Mr. C. G. AUSTIN:

Q. Mr. Beeman, where do you live?
A. Diamond Street, No. 50.
Q. City of St. Albans?
A. Yes, sir.
Q. How long have you lived there?
A. Six years, I think.
Q. And did you know Enoch L. White in his life time?
A. Yes, sir.
Q. How well did you know him?
A. Why, I have known him perhaps for eight or nine years, he rented of me, and I have dealt with him quite a bit and found him

strictly honest and a good worker as he worked for me, that is at different times for, well, perhaps for three years,
279 that is, he was working for the Railway Company, he would work for me a few days now and then when he wasn't out on his trips, that is, when he began first, and I found him a good worker and I don't know nothing to the contrary but he was strictly honest, good, upright man.

Q. Now, at one time did he occupy a house—rent a house of you?

A. Yes, sir.

Q. For how long?

A. I think he rented for nearly three years of me.

Q. And after renting it, did you, and previous to his death, did you make a contract of sale of the house and property to him?

A. Yes, sir, yes, the same house, it is the same house that they live in now, and the same house they rented of me, it is a three tenement house, and they lived in the north tenement for about three years, moved away down at his father's and mother's farm, I think they were down there about a year, and then at the time of his death, I had bargained with him for a house at $25 a month, so he could get him a home. I thought a great deal of him, as he being so honest with me in all of his dealings, paying his rent and all that, he wanted to get a home for himself and family, and I gave him that chance.

(AMEY:) I want that stricken out.

(W. AUSTIN:) We would like to have that stand, we think
280 it is evidence tending to show the intent of this man to provide for his family, his disposition to provide a home for them.

(AMEY:) That isn't responsive, it is too involved and it is immaterial, part of it.

(COURT:) Of course, if it is immaterial, the fact that it is not responsive doesn't make it inadmissible. A very recent decision holds that.

(W. AUSTIN:) What part of the answer does brother Amey ask to have stricken out?

(AMEY:) I think the whole of it should be stricken out as not being responsive to the question.

(COURT:) Well, we will, if you desire, we will overrule the motion, and an exception may be noted for the defendant.

Exception by defendant.

(COURT:) It is received for the purpose suggested by counsel for plaintiff, simply to show a purpose on the part of the deceased to support his family, and a willingness to support them, as bearing upon what he would have been worth to those who are entitled to recover, and for no other purpose, and an exception is noted.

Q. Now, during all this time that he lived in your house, and after they bought it, did you meet him and see him in his house, and in his home?

A. Yes, sir.

281 Q. What was his treatment of his wife and children, as you discovered it?

A. Why, very good, all right.
Q. Well, what do you mean by very good, whether it was——?
A. He wasn't ugly, he was a good provider, for anything that I could see, and kind to his family, his wife and children.
Q. Did he show any attachment to them?
A. Yes, seemed to think a great deal of them.
Q. Now, about how long before his death did you make that arrangement with him to sell him this place on installments?
A. I think it was about November.
A. Previous to his death.
A. Previous to his death.
Q. That would be November, 1911?
A. '12.
Q. No, "11, he was killed in '12?
A. '11.

Cross-examination waived.

282 Mrs. MARY THERESA WHITE, plaintiff, sworn.

Direct examination by Mr. WARREN AUSTIN:

Q. Mrs. White, your name is Mary Theresa White?
A. Yes, sir,
Q. And you are the widow of Enoch L. White?
A. Yes, sir.
Q. How old are you?
A. Thirty-three.
Q. If Mr. White had lived, how old would he be?
A. Thirty-three, past.
Q. At the time of his death, he was thirty-two, was he?
A. He was thirty-two and six months and eleven days.
Q. At the time of his death, where were you and Mr. White living?
A. 189 South Main Street.
Q. And what did your family consist of?
A. A boy and a girl.
Q. What is the name of the boy?
A. Enoch Leon Mortimer White.
Q. And the girl's name?
—. Mildred Amelia White.
Q. How old was the boy?
—. He is seven, past.
Q. How old was the girl?
A. Four.
Q. And in what state of health is the girl?
A. She has got a very nervous condition.
Q And has she always had it?
A. Always had it since she was born.
Q. And are you advised that she always will have it?
A. That is what the doctors tell me.

Q. (Answer objected to and stricken out.)

Q. Was there a child born after his death?
A. Four weeks afterward.
Q. What is the name of that child?
—. Elsie Theresa.
283 Q. It is a girl, instead of a boy?
A. A little girl.
Q. It is Elsie Theresa White?
A. Yes.
Q. So that that girl is now?
A. Fourteen months old.
Q. Have you any means of liv-lihood, had you any means of liv-lihood other than your husband provided at the time of his death?
A. No, sir, I did not.
Q. Did he in some manner make provision for your help after his death?
A. No, sir.
Q. Well, I refer to his insurance in the Brotherhood, did he have some Brotherhood insurance?
A. That was all he had, yes, sir, just the Brotherhood.
Q. How much was that?
A. $1500.
Q. What Brotherhood was that?
A. The trainmen.
Q. Railroad trainmen?
A. Yes, sir.
Q. How long had he been a member of that Brotherhood?
A. About seven years.
Q. Now, had he provided or made arrangements to provide a home for you?
A. He did——
Q. Those arrangements, I suppose are what Mr. Beeman has told us about?
A. Yes, sir.
Q. And are you living in that home?
A. Yes, sir.
Q. At the present time, then, there are three children and yourself?
A. Yes, sir.
Q. Now, was Mr. White a Christian?
A. He was.
Q. Was he a member of a church?
A. He was.
284 (AMEY:) I don't think that is material, I don't care much about it.
(COURT:) Well, I suppose it is offered as bearing on the moral training of the family.
(W. AUSTIN:) Moral training and discipline and influence in developing, nurture care and nurture and moral training, and so on.
(COURT:) Well, I am inclined to let it stand, Mr. Amey, and an exception may be noted.
Exception by defendant.

Q. I show you paper marked "Plaintiff's T" what is that?
A. It is the certificate that Enoch—do you want I should read it?
Q. No, just state in general what it is?
A. Well, it is to certify that he was baptized in the Methodist Episcopal Church of Milton.

(AMEY:) I want an exception to the introduction of that.
(COURT:) He hasn't offered it yet.
(AMEY:) I want an exception to the answer, and I want the answer she gave stricken out.
(Mr. AUSTIN:) I don't object to that being stricken out. I will ask her a leading question.
(COURT:) Yes, that may be stricken out.
Q. Is it a certificate of baptism?
A. Yes, sir, it is.

(AMEY:) I want an exception to that, too.
285 (COURT:) Well, an exception may be noted to that, and it may stand.
(AMEY:) Immaterial.
Exception by defendant.

Q. Now, what is "Plaintiff's U", just what the paper is—is it a certificate of church membership?
A. Yes, sir.

(AMEY:) I ask to have that answer stricken out, on the ground that it is immaterial.
(COURT:) That may stand and an exception be noted.
Exception by defendant.
(W. AUSTIN:) Now, we offer these two papers to show the kind of man Mr. White was as bearing upon nurture, care moral training and discipline of his children.
(Objected to, discussion.)
(COURT:) I will give you an exception, and exclude it.
Exception by plaintiff.

Adjournment.

May 1, 1913—9.00 a. m.

Q. When we closed last night, we were inquiring about the moral capacity and disposition of Mr. White, with reference to moral training of his children. Now, I want to ask you about his intellectual capacity, what kind of a man was he mentally?
A. He was a good, strong, he was a good, strong man.
286 Q. Was he a man who read?
A. Yes, he was a very good read man, read quite a lot.
Q. And what was his health, physical condition?
A. He was a good, strong, robust man.
Q. And how was he for a worker?
—. He was an awful good working man.
Q. Now, when he was not on his runs for the railroad company what did he do?

A. Well, he worked for outsiders.

Q. How much wages did he receive at the time of his death, at what rate was he being paid at the time of his death by the railroad company?

A. About $2.90 a day.

Q. $2.90 you say?

A. Yes.

Q. Do you know how much he received for his labor outside of the railway company?

A. Well, I couldn't tell exact to that.

Q. You don't know about that?

A. No.

Q. How did he make his runs, I mean with reference to the time, tell the jury when he would start for White River and when he would come back, and so on?

A. Sometimes he would start out on Monday morning and come back Tuesday night, then again he would perhaps stay down there a couple of nights, he didn't stay any longer than a couple of nights at a time.

Q. How much would he make on one run?

A. Well, sometimes he would make $5, and sometimes a little over.

287 Q. That depended upon what?

A. Well, I presume it depended on perhaps overtime that they was to get.

Q. How frequent did these runs come?

A. Sometimes about every other day.

Q. That is, I want you to explain that more fully, you mean that he left your house every other day?

A. Yes.

Q. So that he was engaged all the time in going and coming?

A. Yes.

Q. Now, what was his attitude towards the children?

A. He was very kind at home to his children and all the family.

Q. Did he show any interest in their intellectual training?

A. He did.

Q. In what way?

A. Oh, about their schooling, and about seeing that they went to church.

Q. And how did he provide for the family?

A. He was an awful good provider for his family.

Q. Did he talk over with you his plans and his prospects?

A. Yes, he always did.

Q. What do you know about his plans for a home for the future?

A. Well, that was his idea, he always tried and worked awful hard to make a home for his children and family.

Q. When was it that you and he were married?

A. 26th day of May, 1904.

Q. Is this "Plaintiff's S" your Letters of Administration?

288 A. Yes, sir, it is.

(W. AUSTIN:) We ask to introduce these Letters of Administration.

(COURT:) They may be received.

(Plaintiff's Exhibit S. received.)

Cross-examination waived.

(W. AUSTIN:) While we are waiting, I would like to call the jury's attention to an admission of the defendant. It is in the plea.

(Counsel at the Bench.)

(W. AUSTIN:) What I offer to show is one of the pleas in the case, plea of the defendant, asserting that "at the time of the happening of the several things mentioned and set forth in the plaintiff's declaration the defendant was and ever since has been a common carrier by railroad, engaged in commerce between certain states in the United States, to wit: between the State of Vermont and the state of Massachusetts, and the state of Connecticut, and between the state of Vermont and a foreign nation, to wit: the Dominion of Canada; and that at the time of the happening of the several things in the plaintiff's said declaration mentioned, and at
289 the time the plaintiff received the injuries complained of in his declaration, he, the plaintiff, was employed by the defendant, a common carrier, as aforesaid, in such commerce.

(AMEY:) Well, that is a matter of record, anyway, it is in the case.

(COURT:) I should hardly dare to let a pleading be offered in evidence, it is in the case, you can talk of it just the same, but to put it in, to get an additional prominence by making it proof, that is, making it a piece of evidence to be read to them as such, I should be afraid of it. It gives to it, perhaps, an undue prominence. Of course, the law fixes its status before the jury, but under their exception I shouldn't be inclined to receive it as a piece of evidence, any further than the law gives it prominence.

(PALMER:) I may as well state right in this connection, in view of the suggestion of the Court to counsel, that this is not an admission. A plea in bar is not an admission and can't be treated as an admission, and can't be argued by counsel to the jury as an admission, and I say now that I shall very promptly object to counsel's referring to any admission in the pleadings of this case in the argument to the jury. It isn't, a plea in bar is not a legal admission of a fact.

290 (COURT:) Well, our ruling at this present time upon that question would not furnish you any remedy against an error that I might commit in that respect.

(PALMER:) Yes, but I did that by reason of the suggestion of the Court that he could argue it, talk about it.

(W. AUSTIN:) May I have a exception?

(COURT:) You may have an exception to your offer, offering it as evidence, yes.

Exception by Plaintiff.

JOHN KEARNEY, called by plaintiff, sworn.

Direct examination by Mr. W. AUSTIN:

Q. What is your business?
A. Insurance Agent.
Q. How many years?
A. Twenty-five.
Q. Have you had experience in interpreting mortality tables and experience tables of actuaries for insurance companies?
A. I have had occasion to refer to them quite often.
Q. Have you in your possession a copy of the American Table of Mortality?
A. I have.
Q. Will you let me see it, please? What is this, what are these two pages marked "Plaintiff's V"?
A. Copy of the American Experience Table of Mortality.
291 Q. What is the expectancy of life of a man thirty-two years of age?
A. Thirty-three years and 92/100.
Q. Is there any different expectation for a woman than for a man?
A. No.
(W. AUSTIN:) We offer this table in connection with his testimony.
(AMEY:) We don't object to its introduction, so far as the expectancy of life of Mr. White is concerned, but we do object to its introduction to show the expectation of life of Mrs. White, that is the only ground of objection.
(COURT:) That is a new question. The other has been settled.
(W. AUSTIN:) We waive the offer for that purpose.
(COURT:) Very well, you need not waive it, I will exclude it and an exception may be noted, so that if I make an error.
Exception by Plaintiff.
Plaintiff Rests.

292 L. O. GIBBONS called by defendant.

Direct examination by Mr. AMEY:

Q. I believe you have testified that you were the conductor of 401.
A. Yes.
Q. That is, on the 11th and 12th of January, 1912?
A. Yes.
Q. The train upon which Mr. White was killed?
A. Yes.
Q. Did you stop at Randolph that night?
A. Yes.
Q. I believe you have testified that you stopped there about four minutes?
A. Yes.
Q. Now, sir, did you see flagman White while you were stopping at Randolph after you got off the train?

A. Yes.
Q. Where was he when you saw him?
—. He got off the caboose the same time that I did with his fusees and lanterns and torpedoes and started back down the track.
Q. What did you tell him to do?
A. Look out for the rear end of his train.
Q. After you saw him there and after you told him what to do where did you go.
A. I started toward the head end of the train to see what it was stopped for.
Q. What were you going up there for?
A. To see what we stopped for.
Q. And where was he standing with reference to the caboose when you started toward the head end?
A. He started back down the track.
293 Q. Do you remember how far he was from the caboose at that time?
A. Well, he left the same time that I did. I didn't notice just.
Q. Now, then, when you got up toward the head of your train how far up were you when you stopped?
—. I was about ten or 12 cars.
Q. Then did you hear anything from the engineer at that time?
A. He whistled Release brakes ready to proceed.
Q. And what did you do?
A. I looked back to see where the flagman was.
Q. Did you see the flagman?
A. I saw him approaching the train.
Q. How far was he from the rear of the train at the time you saw him——
A. He probably was about a telegraph pole.
Q. Was he coming toward the train?
A. Coming toward the train.
Q. And did you receive any signal from him?
A. I received a proceed signal when he got to the van.
Q. And did you proceed thereupon?
A. I gave the proceed signal to the engineer and the went along.
Q. And you may state how many blasts of the whistle the engineer gave?
A. Two long whistles.
Q. And was that—what did that indicate?
A. That we—it indicated to release brakes ready to proceed.
Q. What is the signal that calls in the flagman?
A. It is four long whistles, from the south.
Q. After you started up the line where did you ride, in the caboose?
A. Well, after we got by the town I had my detention work *down*, my writing done, what I had to do there, I was in the monitor of the caboose.
294 Q. What were you doing there, Mr. Gibbons?
A. I was watching out of my train, what I could see.
Q. Were you looking ahead?

A. I was looking ahead, yes.

Q. Where was White after you left Randolph, where was White in that car, after you last saw him?

A. The last I saw of him he was sitting in front of the stove in the main body of the caboose.

Q. What was he doing?

A. Lighting his pipe.

Cross-examination by Mr. WARREN AUSTIN:

Q. Now you gave a statement, signed a statement some time ago with reference to what you and Mr. White did, and at Randolph, with reference to that train, didn't you?

A. I signed a statement to that effect.

Q. Yes. I show you Pl'ff's W. and ask you if you remember that?

A. I do remember it. That looks like my signature.

Q. Is it your signature?

A. Yes.

Q. Let me refresh your recollection. Did you then state in writing: "I myself and my crew were doing everything that we knew of that was necessary and proper for the progress of our train. There was nothing in the movement of our train that indicated any danger or that called for any exertion on our part by way of other signals than we had on the train."

(PALMER:) I object to reading from a written document until we find out whether that is a written document that he has
295 authority to read from.

(COURT:) Well, the Supreme Court has quite recently held that proper, to read from a letter.

(PALMER:) Well, if it is an authenticated letter, there is no question about it. I didn't quite hear what the witness said.

(COURT:) The witness said that he signed it.

(PALMER:) Well, I desire to interpose the objection that the instrument which is being read by counsel has not been properly shown to have been a document signed by the witness.

(COURT:) Well, proceed with the question. An exception noted for the defendant.

Exception by Defendant.

(Question continued.) "We were doing all that I believed that was necessary and proper for us to do upon that occasion. He was in the line of his duty as well as myself and other men of the train, and I see no fault on my part or on the part of Mr. White that caused the collision." Now, Mr. Gibbons, did you intend to say at that time what I have read to you here?

(AMEY:) Now I desire to interpose an objection that the substance of the question calls for an answer that should be answered by the jury in their verdict, rather than by any witness upon the stand. In other words, it is a conclusion.

296 (COURT:) Well, you have shown in direct evidence what was done there for the purpose of showing that it was im-

prudently done, I suppose, if it has any bearing; that is, that the action of the deceased was improper, not in accordance with the rules. Was that the purpose of it?

(AMEY:) That is it exactly.

(COURT:) Well, we receive this simply as bearing upon the truth of that statement, as to whether that was true or otherwise, and for no other purpose.

Exception by defendant.

(AMEY:) Allow me to make a further objection. The witness interprets in that, if he ever made the statement, what constitutes a proper measure of due care under the circumstances instead of stating facts.

(COURT:) Well, we have ruled and the exception has been noted.

(AMEY:) For the reasons s-ated.

(COURT:) And the answer may be received.

A. Yes.

Redirect examination by Mr. AMEY:

Q. Where was that statement given, Mr. Gibbons, where did you give that statement to these gentlemen?

A. I think Mr. Austin must have got that about the time of the investigation of the commissioners.

Q. And that was a statement that was given to Mr. Austin?

A. Yes.

297 DANIEL A. MCDONALD, called by Def't. Sworn.

Direct examination by Mr. AMEY:

Q. What is your business?

A. Locomotive Engineer.

Q. How long have you been a locomotive engineer?

A. Six or seven years.

Q. Where have you worked as a locomotive engineer aside from on the Central Vermont?

A. Main Central and Grand Trunk.

Q. Were you the engineer on 708 the night that Enoch L. White was killed?

A. Yes, sir.

Q. And was that in January 1912?

A. Yes, sir.

Q. And a man by the name of Russell your fireman?

A. No, sir.

Q. What was he?

A. Head brakeman.

Q. Was he riding on the engine with you?

A. Yes, sir, at times.

Q. Did he ride on the engine all the way from White River Jct. up to the scene of the wreck?

A. No, sir.

Q. Where did he get off the engine after you left White River Junction?

A. He went back on his cars to get his all-right motion from the rear at every station.

Q. And when he went back did he come immediately back to the cab?

A. Yes, sir.

Q. Now, did he ride on the pilot of the engine before you left White River Jct.?

A. No, sir.

Q. What about the lining up of the switches, did he do that?

A. Certainly did.

298 Q. And what do you mean by lining-up switches, Mr. McDonald?

A. Well, I make it a practice of sending my brakeman up to throw the switch before I start the train to avoid restarting the heavy train at the White River Junction yard on account of the up grade.

Q. And was that true on the night of January 11th?

A. Yes, sir.

Q. Did he have any difficulty about seeing those switch-lights that night in White River Jct. yard?

A. In the yard?

Q. Yes.

A. I seen them.

Q. You saw them?

A. Yes, sir.

Q. You saw them before you passed them?

A. Yes, sir.

Q. And did he get onto the pilot of the engine and ride up because he couldn't see the switches?

(Objected to. Question withdrawn.)

Q. Now, Mr. McDonald, you may tell the jury what Russell did do with reference to lining-up the switches at White River Junction?

A. I told him to go out and line the switches up for me and he went up and lined the switches up for me and turned it red proper for me to go out, and come back and got on the top of the train and waited for the all-right motion from the rear.

Q. And when the all-right motion was received what did you do?

A. Proceeded.

Q. Now, sir, you may tell the jury whether there are quite a number of switches between White River Jct. and Randolph?

299 A. There are. I would say about two dozen on a guess.

Q. Are you sure about the number, Mr. McDonald?

A. I can't tell the exact number that leads from the main line.

Q. Can you now tell me?

A. There is three at Hartford, two at West Hartford is five; there is five at Sharon is ten; there is two at Royalton is twelve; there is seven at Bethel is nineteen.

Q. How many at South Royalton?

A. There is three at South Royalton is twenty-one. At Randolph seven, at Randolph,—twenty-eight switches leading from the main line.

Q. Now, sir, are those switches, are the lights on those switches lighted up at night?

A. Yes, sir.

Q. Were they on the night when you went up through there?

A. All of them.

Q. Did you see those switches before you passed over them, all of them?

A. Yes, sir.

Q. And what kind of a light was displayed to indicate that the mainline was all right that you could pass on that main line?

A. Light shows green.

Q. Did you see any fusees or hear any torpedoes that night between White River Jct. and the scene of the wreck?

A. No, sir.

Q. If there had been any fusees burning could you have seen them?

A. Positively yes.

300 Q. If there had been torpedoes on the rail could you have heard them?

A. Yes, sir.

Q. Do you rely upon tail lights to indicate that there is a train ahead?

A. No, sir.

Q. What do you rely upon?

A. The proper flagging utensils—in the day time flags of the proper color and torpedoes; at night fusees and torpedoes and a red light.

Q. What sort of an engine was 708?

A. Compound engine.

Q. Were you making good time with that engine that night?

A. Not the average.

Q. Well, you were going along about how fast should you say?

A. Not faster than 20 miles an hour.

Q. What is the average speed for a freight train under those circumstances?

A. I should say 20 or 25 miles an hour.

Q. Is there any schedule for an extra?

A. No, sir.

Q. And if one extra comes up with another, will you tell the jury if that had a right to pass the other under the rule?

A. They can without orders.

Q. Well, sir, I want you to tell the jury if the engine 708 was steaming so as to obstruct your view all the way up?

A. No, she did not obstruct my view all the way up.

Q. How about that?

A. Well, there were time- she would obstruct my view on account

of escaping steam; she was a very free steaming engine, and her safety valves would open quite often.

301 Q. Now, sir, I want you to tell the jury if there is any way absolutely to prevent an engine from steaming when it is on the road?

A. Well, I don't just understand the question.

(AMEY:) I will withdraw that question.

Q. It is a normal function of an engine to steam?
A. She has to steam to perform her duties.
Q. And if the engine didn't steam would it move, would it go?
A. No, sir.
Q. Now, sir, under ordinary conditions does that steam sometimes obscure your view?
A. Under ordinary circumstances?
Q. Under ordinary circumstances?
A. Yes, sir.
Q. Is that true when the engine is all right?
A. Certainly is.
Q. And you may tell the jury whether from your experience as a locomotive engineer the steam will show up plainer on a cold night?
A. Oh, positively. A cold night it takes a very small amount of steam to show.
Q. Well, when that engine was booked for repairs by you were the repairs made as you directed?
A. Yes, sir. I booked all repairs on that engine and they were booked off before I went out.
Q. Did you know about the engine on 401, engine 401, did you know engine 401?
A. Yes, sir, I ran her.
Q. Was she a good engine?
A. Yes, sir, she was a pretty fair engine.

302 Q. Is it a difficult thing, Mr. McDonald, to keep your engine tight around the pistons so that steam won't escape?
A. It is.
Q. Is that true of any engine?
A. Any engine in my experience.

Cross-examination by WARREN AUSTIN:

Q. Mr. McDonald, what are tail lights for?
A. Tail lights denotes the rear end of a train.
Q. They are there to catch the eye of a person coming up in the rear of the train, are they not?
A. Not necessarily. For the man ahead.
Q. How can the man ahead see the tail lights?
A. Well, sir, if I didn't see my tail lights I wouldn't run the train.
Q. Can you see the red lantern that hangs in the chain at the rear end of your train?
A. No, sir.

Q. Now you say that you rely solely on signals for information regarding a preceding train. Is that true?

A. Yes, sir.

Q. And is it the whole truth? Don't you rely on clearance cards to show you a train that has last passed a station at which you have stopped to receive an order?

A. Not always.

Q. Haven't you so stated under oath? Can you answer the question?

A. I don't say so. You can show me my statement, I might.

Q. You were a witness before the public service commission, were you not?

A. I was.

303 Q. You were under oath at that time?

A. Yes, sir.

Q. You were examined by Mr. Redmond, chairman of the commission, were you not?

A. I cannot say positively.

Q. Didn't he ask you this question, "Would you have expected that if there was a train ahead of you, that you would have had notice of it on the clearance card?" and didn't you then tell him "It should show unless they had met another train at Randolph". Question. "It should show?" Answer. "It should show." Didn't you so testify?

A. I don't just remember to that.

Q. Well, will you say that you didn't?

A. It should show under certain conditions.

Q. I am asking you if you so testified?

(COURT to witness:) The question is, didn't you so testify, not whether it is a fact.

A. I could not understand that now, positively.

(W. AUSTIN:) Were you not asked this question? "Should the clearance card have told you in the circumstances of this case that 401 was ahead of you?" and did you not answer "Yes, it should?"

A. I wouldn't say.

Q. Well, do you deny it?

A. I might have made that statement.

Q. Were you not asked this question, "Now, in those circumstances, just those circumstances, 401 not yet having reached Randolph, should the clearance card state anything about 401 to you at Bethel?" and didn't you answer, "It should have been

304 filled in, I suppose, that 401 had left the station at such a time".

A. I might have.

Q. Now, what do you say whether you rely upon anything else besides torpedoes and fusees and flagman to warn you that a train is immediately before you?

A. Well, that clearance card would have nothing to do with me in regard to the train ahead of me.

Q. That is the only answer you desire to make to that, is it?

A. Yes, sir.

Q. I suppose that you have some respect for the rules of the Company?

A. I certainly do.

Q. And when a Company commands its employees to warn and its engineers to receive that warning, you have respect for that, haven't you?

A. Yes, sir.

Q. Don't you know that rule 221 forbids you to move without that card containing that information?

(AMEY:) I want the witness to be shown rule 221 if he is going to testify.

(W. AUSTIN:) I am willing to show it to him, I am asking for his knowledge.

Q. Read the third paragraph of rule 221 aloud, please.

(AMEY:) Yes, and I think the witness should be allowed to read the whole rule.

(COURT:) Well, he is examining the witness. If you desire to have him go farther, why you can do that on your examination.

305 Q. Read the third paragraph of rule 221.

A. "A train stopped by a train order signal must not proceed without a clearance card Form-A or a caution card, Form-C, although train orders may have been received."

Q. Does that affect you as an engineer of the defendant?

A. Yes, sir.

Q. Now, you have whiffled around about this question of steam several times, have you not?

(AMEY:) We want an exception to that question.

(COURT:) Well, and exception may be noted and the witness may answer the question.

Exception by defendant.

A. I don't understand the meaning of the word whiffle.

Q. Whiffle means to shift, to waver, to wobble, to start out and then turn and go back, to not adhere to any one position.

(PALMER:) Now, I object to the counsel's definition of the term whiffle and object to the question as improper and immaterial—and whiffling.

(COURT:) Well, an exception may be noted, and the witness may answer the question.

Exception by defendant.

A. I have not.

Q. Now, in the first place right after this wreck, you went down to the station at Randolph and made a report to your superior officers, didn't you?

A. I did not.

306 Q. Didn't you tell conductor Wright what was the cause of the accident?

A. I don't remember.

Q. And didn't he under your very eyes make a report of what you said the cause of the accident was?

A. He might have.

Q. Didn't you then and there tell him that it was because it was impossible to see by your engine on account of steam?

A. That that was the cause of the accident?

Q. Yes, sir?

A. I did not.

(W. AUSTIN:) Have you got the original report in this case? (AMEY:) I haven't got it here.

Q. Well, you were called on regarding this question before the Public Service Commission?

A. Yes, sir.

Q. And you were asked this question, "Was it leaking steam?" and you answered, "Yes, sir," didn't you?

A. I did not answer "Yes sir."

Q. Were you not asked this question, "Did this leakage of steam obstruct your view to any extent?" and did you not answer, "It did."?

A. At times.

Q. Did you so testify?

A. Yes, sir.

Q. Then were you immediately asked, "Give us an opinion of how much that was." and didn't you answer, "You couldn't see by her on this particular night, it was a particularly cold night, and the wind would blow the steam over on my side, so it was impossible for me to see ahead only at times". Didn't you so
307 testify?

A. Yes, sir.

Q. Were you not asked this question, "When you came to this point where this collision occurred, if your view had been unobstructed in any way, how far from the point of the collision could you see the tail lights of that No. 401"? and didn't you answer, "Oh, possibly a half a mile. The collision occurred one mile and three-quarters north of Randolph, actual measurement." You say you did so testify?

A. Yes, sir.

Q. And this question, "You say on that particular night with your vision unobstructed you could have seen the tail lights of that caboose how far away?" "About a half a mile." Did you so answer?

A. I think so.

Q. And were you not asked this question, "W-ich reason you didn't see them was because of this steam" and didn't you answer, "It certainly was"?

A. I Think so.

Q. And then you were asked "Was that steam obstructing your vision all the way from Randolph up to the time of the collision?" and your answer, "It would clear away at times."

A. Yes, sir.

Q. And this question, "Would you say that was so during the

whole of that half mile?" and didn't you answer, "There was no way that I could see the tail lights." Did you so answer?

A. Yes, sir.

Q. And then weren't you asked, "That is true the whole of that half mile, your vision was wholly obstructed by that steam,
308 is that right," and didn't you answer "Yes."

A. Yes, sir.

Q. And then were you not asked "How long had you been running that engine at that time"? and didn't you answer, "About a month."?

A. Yes, sir.

Q. And then "Had she been leaking like that all the time?" And you answered, "I don't know as she was leaking as bad as she was on this night." What do you say about that?

A. Yes, sir.

Q. Were you not asked as follows, "Had you before this night discovered that this steam leaked so much on this engine as to obstruct your vision?" and you answered, "Yes, sir"?

A. Yes, sir.

Q. And were you not asked, "Had you ever reported it?" and you replied, "Yes, sir"?

A. Yes, sir.

Q. "And to whom?" Answer "Proper authorities."

A. Yes, sir.

Q. "And who are they?" Answer, "Locomotive foreman."

A. Yes, sir.

Q. "Did you report it verbally or in writing?" Answer "We do all our reporting in writing."

A. Yes, sir.

309 Q. So that you reported it in writing?" "Yes, sir."

A. Yes, sir.

Q. Now were you asked "Was she leaking every time you came in"? Answer "No, not every time." Did you so testify?

A. Yes, sir.

Q. And then were you asked, "How many times previous to the accident should you say you reported her?" and did you answer, "I couldn't say."

A. Yes, sir.

Q. And then, "Half a dozen?" and you answered, "Somewhere around there, the book will show."

A. Yes, sir.

Q. Now, then, someone else took you up and asked you questions, didn't they, and you were asked this question, "And on the whole do you say that your failure to see those lights, those tail lights which was the manifest cause of this accident, was due to the leaky condition of that engine?" Did you then answer, "Not wholly."?

A. I couldn't say about that.

Q. Then were you asked, "Well, was it due to that?" and you answered, "Partly."?

A. Will you tell me where I made that statement?

Q. I am asking you if you gave it before the Public Service Commission?

A. This statement you have——

Q. Yes, sir?

A. I don't remember about that part of it.

310 Q. Well do you remember of testifying this way, "Do you say if it hadn't leaked that you would have seen those headlights?" Answer, "No, I wouldn't say that." and then Question, "You say, 'no'?"

A. I don't understand. There was no headlights ahead of me.

Q. You mean to say you didn't so testify?

A. Well, the question was wrong, if I answered it, for there was no headlights ahead of me.

Q. What do you say about whether you testified that way or not?

A. I couldn't say about that.

Q. Well, did you testify this way, "What is your judgment about it in the circumstances?" Answer, "Well, if the engine didn't leak any steam." Did you so testify?

A. I don't remember about that part of that testimony.

Q. And then the question was asked, "I am talking about leaking" Answer. "If this engine hadn't leaked any steam I probably could have seen them." Did you so testify?

A. I might have.

Q. And then the question was asked, "And by leaking, you mean steam that should not have escaped from the engine?" and did you not then answer, "It should not to obstruct the view of an engineer."

A. I might have.

Q. Well, was that the truth?

A. If I testified to it at the time, it was.

311 Q. Then again, did not Mr. Redmond call you back to the stand after others had testified and ask you this, "Did she leak steam the first trips you had her?" and you answered "She did."?

A. I might have.

Q. "And you began your complaint then?" and you answered, "Yes." Did you so testify?

A. I might have. I don't remember.

Q. Then the question, "Had you ever run her before she went to the shops"? and you answered, "Yes, I guess I have." Do you remember that?

A. I might. I don't remember that testimony.

Q. And then was the question asked you, "Do you remember whether she leaked steam then?" and you answered, "Nothing unusual." Did you so testify?

A. I might have.

Q. Well, now, then, having so testified, didn't you, when the Messenger came out with the report of that testimony about you, didn't you voluntarily make a contribution to the Messenger denying the whole thing?

A. Denying the error that appeared in the Messenger, yes, sir.

Q. I show you paper marked "Pl'ff's Ex. X." heading "Wishes to

correct Error." "D. A. McDonald tells of testimony before Public Service Commission." And ask you if you signed the original of the fiction to the St. Albans Messenger?

312 A. I certainly did.

(W. AUSTIN:) We wish to read this here now, "Pl'ff's Ex. X" to the jury.

(Pl'ff's Ex. X" read to the jury.)

Q. Well, you made another statement in writing, didn't you about this steam?

A. In writing?

Q. In writing, signed by you?

A. I don't know as I have.

Q. Didn't you write S. Hollister Jackson, a member of the Public Service Commission, regarding the leaking of steam on that engine after you had—no, before you had made this statement in the paper?

A. I wrote the Railroad Commission Chairman a statement of all accidents, this one included.

Q. Didn't you on the 22nd day of January 1912, write him as follows: "To S. Hollister Jackson"?

Objected to. Discussion. Question waived.

Q. I will ask you this, without reading anything, didn't you write S. Hollister Jackson that the condition of steam on your engine that night prevented your seeing that train and caused that accident?

A. I don't believe I did.

Q. Now where was the steam leaking from on that engine on that night?

A. I couldn't tell you where it was leaking from, there was a lot of escaping steam.

Q. I am asking you about leaking, Mr. McDonald?

A. Well, it is pretty hard to tell, I couldn't tell, you where the steam was leaking from that engine.

313 Q. Why not?

A. Because I don't know.

Q. Was there so much steam that you couldn't see where it came from?

A. Not leaking.

Q. Answer the question, was there so much steam that you couldn't say where it came from?

A. Well, that would be pretty hard to answer.

Q. Well, wasn't she leaking from the left cylinder?

A. No, sir.

Q. Wasn't she leaking from the right steam chest?

A. Steam chest was not leaking.

Q. It wasn't. The steam valve wasn't leaking was it?

A. The what?

Q. The steam, the valve in the steam chest wasn't leaking?

A. That might have been leaking.

Q. Might have been—well, what do you say was it or wasn't it?
A. I think it was leaking.
Q. You have got a pretty vivid recollection of that, haven't you?
A. Well, I don't know.
Q. Well, hadn't you ought to have, Mr. McDonald?
A. Quite a while ago.
Q. Well, you had reported it a great many times before that, hadn't you?
A. The books will show you.
Q. I ask you to answer that question?
A. I will not say, I will have to refer you to the books, it is too far away.
Q. You have no recollection of repeatedly, time after time, reporting that right valve stem?
A. I wouldn't say that, positively.
314 Q. No. You had broken a stay-bolt, hadn't you?
A. She might possibly have broken a stay-bolt.
Q. At any rate you were getting a leak from the stay-bolt on your side of the engine, weren't you?
A. I think so.
Q. Practically every fitting on the inside of that cab was leaking, was it not?
A. Why, the fittings were not leaking.
Q. They weren't?
A. No, sir.
Q. Well, what did you report them for then on the arrival of that train at St. Albans?
A. Well, fittings has to be repacked at certain times.
Q. What for?
A. Why, packing will only last just such a length of time.
Q. Packing is what keeps the steam in, isn't it?
A. Yes, sir.
Q. And when you got home with that engine you requested them to repack every fitting in that cab, didn't you?
A. I would any engine that went to the shop.
Q. I am not asking you that, sir. Didn't you then and there ask it?
A. Yes, sir.
Q. Didn't you then request them to turn the right valve steam so that it wouldn't leak?
A. The book will show, I wouldn't say.
Q. Haven't you repeatedly asked them to repair that right valve stem?
A. I couldn't say positive.
Q. Didn't you report the left piston and ask them to repack that when you got in?
A. I wouldn't say.
315 Q. Didn't you tell them to repair the steam pipe at the combination?
A. I might have.
Q. Now, you didn't order these things done for nothing, did you?

(PALMER:) That is objected to as incompetent and improper.
(COURT:) Well, he may answer the question.
Exception by defendant.

A. No, sir.
Q. Did you also report this engine at the round house there at White River Jct.?
A. If she needed it, I did.

(W. AUSTIN:) Have you got the work nook here for the month preceding the 11th and 12th of January, 1912?
(AMEY:) I haven't them here.
(W. AUSTIN:) Will you produce them?
(AMEY:) We will if you want them. We supposed your case was closed.
(W. AUSTIN:) Well, this man testifies that he didn't make statements before that were inconsistent with the statements he has made here. That is the object of these inquiries to show that repeatedly for a long time this man had been complaining of that engine leaking steam.
(COURT:) Well, do you give the defendant notice now to——
(W. AUSTIN:) To produce those books, the work books that he says, he keeps telling me to refer to the work books. I can't refer to it, it is in their possession.
316 (COURT:) Well the defendant will take notice of the request.

Q. Now, when you run an engine as an engineer, isn't it one of your duties to watch ahead and see what is on the track ahead of you?
A. Yes, sir.
Q. Then isn't it necessary that you should have such an engine that you can look by it and see ahead?
A. Yes.

(W. AUSTIN:) We want to reserve the right to ask him further questions when we get that book that he has referred us to.
(COURT:) Very well.

Redirect examination by Mr. AMEY:

Q. I show you rule 91 in "Pl'ff's Ex. B" and ask you if that rule was used in connection with the clearance card. You read that over.

Objected to. Discussion. Question admitted.
Exception by plaintiff.

A. Was that rule lived up to?
Q. I am not asking—you are not to ask me questions. You read that rule and then we will have the question read and see if you can answer it.
(Ques. read.)
A. Yes.

Q. And is the purpose of a clearance card so that the trains won't keep nearer together than five minutes?

A. Yes, sir, that is one of the purposes.

317 Q. And is there anything with reference to the use of a clearance card that would excuse a flagman from protecting the rear end of his train?

A. No, sir.

(AMEY:) I would like to introduce rule 91 in connection with the testimony of the witness.

(COURT:) Any objection?

(W. AUSTIN:) Well, I don't care to have an exception, I wouldn't want the ruling against us, although I don't think that rule applies.

(COURT:) Well, then, it may be received.

Rule 91.—"Unless some form of block signal is used, trains in the same direction must keep at least five minutes apart, except in closing up at stations, but a train must not follow a train carrying passengers or operating a snow-plow until a report is received of its arrival at a station ahead, except that a train may follow twenty minutes after the departure of a train carrying passengers or operating a snow-plow, when either the station from which it is to follow or the next station ahead is not a telegraph station, or when communication with the train Despatcher is interrupted, and the wire failure is noted on the Clearance. The train order signal will be used by operators to maintain the intervals required by this rule. Schedule speed must not be exceeded by sections of trains other than the first section, nor may a train following a train carrying passengers, exceed the schedule speed of such train unless clearance shows arrival at a station ahead."

318 Q. Now, do extras travel on schedule?

A. No, sir.

Q. It isn't anything extraordinary, Mr. McDonald, is it to ask for repairs for an engine?

A. No, sir.

Q. In your experience as an engineer, will you tell the jury whether you frequently have to ask for repairs?

A. Well, in my experience I never brought an engine in a half dozen times in my experience that didn't need repairs.

Q. And that is due to the use of the engine, isn't it?

A. Natural wearing of the engine.

Q. And was that so with reference to 708?

A. Yes, sir.

Q. And when you report an engine fo repairs you write it down in a book do you?

A. Yes, sir.

Q. And sign your name?

A. Yes, sir.

Q. And as I understand it, when the repairs are made, the repairs are put on the opposite page and are signed by the person making them, is that it?

A. Exactly.

Recross-examination by Mr. WARREN AUSTIN:

Q. Well, if they are not signed what do you say, are they made?
A. Well, I couldn't say about that.

319 F. A. PINGSTON, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. What is your business?
A. Locomotive engineer.
Q. Where are you employed at the present time?
A. On the Grand Trunk out of Bellevue.
Q. That is up in Ontario?
A. Yes, sir.
Q. Where were you employed in January 1912?
A. Out of St. Albans on the Central Vermont.
Q. You may tell the jury if you were running engine 401 on the night in which Mr. White received his fatal injuries?
A. I was.
Q. And did you run that train from White River Junction up to the scene of the accident?
A. I did.
Q. Do you remember whether you looked at your watch up there to note the time when those trains collided?
A. I did.
Q. What time was it?
A. 1.07 A. M.
Q. That is, one o'clock and seven minutes past you mean?
A. In the morning.
Q. Did you know that there was a train following you?
A. I had word.
Q. Now, sir, your duty was in the engine, so you didn't know anything about what was going on, on the rear end?
A. I did not.
Q. About what rate of speed were you making at the time of the accident?
A. I would judge between eight and ten miles an hour.
320 Q. And was 401 a good engine?
A. Yes, sir.
Q. Capable of making the required time?
A. Yes, sir.
Q. And I understand that you were delayed at different places along the route?

Objected to as leading. Question withdrawn.

Q. Did you stop anywhere between White River Jct. and the scene of the accident.
A. I did.
Q. Where did you first stop, Mr. Pingston?
A. West Hartford.
Q. And for what purpose did you stop there?
A. Meeting a south bound extra.

Q. Where did you stop next?
A. At South Royalton.
Q. For what purpose?
A. Meeting a south bound extra, and No. 10.
Q. And do you know how long you stopped at West Hartford?
A. I would judge something like 30 or 40 minutes.
Q. Did you stop at Hartford, or did you not?
A. I did not.
Q. Now, then, coming up the line where was your next stop?
A. At Bethel.
Q. What did you stop there for?
A. Stopped there for water.
Q. Coming up the line where was your next stop?
A. Randolph.
Q. Then did you stop anywhere between Randolph and the scene of the wreck?
A. I did not.
Q. Do you know whether Mr. White or Mr. Gibbons knew that a train was following?
A. Well, I don't know unless—only just what he said that they were——

(W. AUSTIN:) Wait.

321 Q. Well, I dont' want you to state what he said.
A. I don't know that they knew, no.

Cross-examination waived.

W. S. HUTCHINSON, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. Did you go down to Randolph yesterday?
A. Yes, sir.
Q. Who went with you?
A. Mr. Pingston.
Q. And did Mr. Pingston point out to you the scene of the collision on January 12th, 1912?
A. Yes, sir.
Q. In which Mr. White was killed?
A. Yes, sir.
Q. By the way, have you a plan of West Randolph, or Randolph, there?
A. Yes, sir.
Q. I show you plan marked "Def't's Ex. 1" and ask you what that is?
A. It is a blue print of Randolph yard.
Q. Now, sir, which way is north and which south on that plan?
A. This way is north (indicating).
Q. You mean that as the plan is in front of the jury, that the right side up in front of the jury, that the end nearest the judges' bench is north?
A. Is north, yes.

Q. And the opposite end is south?

A. Yes, sir.

322 Q. I would like to have you locate on this plan Randolph station, the passenger station at Randolph?

A. It is represented by this square here that is marked C. V. Station.

Q. What is the scale of this plan?

A. 50 feet to one inch.

Q. Now you may point out the different buildings on each side of the track there? *A.* I shall have occasion to use them later and I want you to point them out.

A. Well, opposite from the station is the freight house and the (?) & Co.'s factory.

Q. Where is that with reference to the tracks?

A. It is west of the track and about 50 feet over.

Q. Is that north of the station?

A. That is north of the station.

Q. Now, what is the next building as you approach the station?

A. Well, there is three buildings in there, I don't know what they are; they are not marked.

Q. Is there any other building between the one first mentioned and the station?

A. There is one on the opposite side of the tracks marked Randolph fire department.

Q. And beyond the station going south what is the first building and where with reference to the tracks?

A. It is just south of the station and to the east of the track, it is the Gays and Boyd block.

Q. Is there one on the opposite side of the track there?

A. No, not directly opposite.

323 Q. What is the next one as you go down?

A. Well, that must be another block on Main St., quite a distance there.

Q. Which is the village side there?

A. The bottom of the map.

Q. Now, is there a crossing there?

A. Yes, sir, just south of the station.

Q. You may tell me how far south of the station that crossing is?

A. About 15 feet south of the platform.

Q. Are there any buildings still south of the crossing, still farther south?

A. Yes, sir.

Q. How far south of the crossing is the first building?

A. Well, it is about—this Gays and Boyd block is right at the crossing, right on that street.

Q. Have you got that crossing marked—is that crossing you mention marked Main St.?

A. That is Main St. crossing.

Q. Are there buildings between that and another crossing as you go south?

A. Yes, sir.

Q. And what are those buildings?

A. Gay & Boyd block, a small bank building and a building in between. It is another block on Merchants Row and the printing office.

Q. What building is there up on the opposite side there?

A. It is marked bottling works.

Q. Then do you come to another crossing?

A. Yes, sir.

Q. What is that?

A. Pleasant St.

Q. Now, as you go south are there any other buildings below Pleasant St. Crossing?

A. Yes, sir.

324 Q. How many buildings have you got on your plan in there?

A. Ten.

Q. Is there south of the crossing at Randolph an embankment, does the railroad run through a cut?

A. Why, yes, it is — slight cut.

Q. Where is that cut?

A. Well, it begins about 200 feet south of the Pleasant St. crossing, extends down there three or four hundred feet.

Q. Have you stated how far the Pleasant St. crossing is from the depot?

A. No, I have not.

Q. I wish you would tell me. You better scale it, have you got a scale?

A. No.

Q. Well, what do you say, how far is it?

A. About 500 feet.

Q. Does the curve begin beyond the crossing as you go south?

A. Just a little beyond the crossing, south of the crossing.

Q. Standing at the station, how far could anyone see standing on the main line, how far can anyone see south of the station?

A. 1250 feet.

Q. Have you made measurements to indicate the distance of the wreck of January 12th from Randolph station?

A. Yes, sir.

Q. When did you make those measurements?

A. Yesterday morning.

Q. How far is the wreck, or was the wreck involved in this case, north of Randolph station?

A. 9,432 feet.

Q. What would that be in miles?

A. The nearest fraction would be a mile and four-fifths.

325 Q. Have you searched the records of the company to ascertain, the records of your department—you are in the engineering department, I understand?

A. Yes, sir.

Q. To ascertain the number of main line switches between White

River Jct., including the yard west of the station and the scene of the accident?

(W. AUSTIN:) Are you going to change your evidence on that subject?

(AMEY:) I want to point out the location of them. I do think that the witness who testified before was mistaken. I want to show that there were 36 switches, main line switches, from the records. He was testifying from memory and didn't recollect it.

(AUSTIN:) Could'nt show it this way. He can't testify from the records, not legally.

(AMEY:) We have, if your honor please, here blue prints of the different stations and different switches, main line switches, between White River Jct. and the scene of the accident.

(COURT:) Well, he may refresh his memory from those and testify.

Q. Well, you may take those blue prints and refreshing your memory from them, you may tell me where those switches are and the number, all the switches north.

326 (COURT:) He may refresh his memory from other data.

A. I have a list of them.

Q. Well, refreshing your memory from the list then, how many are there north of the station in the White River Jct. yard?

A. Eight.

Q. Leading off the main line?

A. Yes, sir.

Q. What is the next station beyond White River Jct?

A. Hartford.

Q. How many are there at Whiteford?

A. Three.

Q. Coming in this direction from White River Jct.?

A. Yes, sir.

Q. At Hartford you say how many?

A. Three.

Q. Are there any at West Hartford?

A. Yes, sir.

Q. How many?

A. Two.

Q. Are there any at Sharon?

A. Yes, sir.

Q. How many?

A. Five.

Q. Sharon is the first station north of West Hartford?

A. Yes, sir.

Q. What is the next station north of Sharon?

A. So. Royalton.

Q. How many are there there?

A. Three.

Q. And what is the next station north?

A. Royalton.
Q. How many main line switches are there there?
A. Two.
Q. Which is the next station north?
A. Bethel.
Q. How many main line switches there?
A. Seven.
Q. And the next station is Randolph?
A. Randolph.
327 Q. How many main line switches there?
A. Seven.
Q. And by main line switches do you mean adjacent to the main line?
A. Well, switches coming off the main line, yes, sir.

Cross-examination waived.

C. E. PRESTON, called by defendant, sworn.

Direct examination by Mr. AMEY.

Q. What is your business?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. Nearly 24 years.
Q. How long have you served in that capacity for the Central Vermont Railway Company?
A. Well, the most of the time.
Q. Have you ever run engine 401?
A. I don't think so.
Q. Do you know engine 708?
A. Yes, sir.
Q. Have you ever run engine 708?
A. Yes, sir.
Q. When did you run engine 708?
A. I ran her in November and a portion of December 1911.
Q. Between what points did you run?
A. St. Albans and White River Jct.
Q. What can you say about engine 708, is she a good engine or not?
A. A-number one.
328 Q. Let's see, this you say was in November 1911, Mr. Preston?
A. Yes, sir.
Q. You may tell the jury if at that time she had recently come from the shops?
A. Yes, sir, she had.
Q. Do you know where she was overhauled?
A. Montreal.
Q. You may tell the jury, Mr. Preston, if it is possible to prevent the leakage of steam on engines and to prevent it at all times?

A. Certain leaks can be prevented if they occur between terminals or on arrival at a terminal.

Q. Where does steam normally escape from an engine, Mr. Preston?

A. Well, you mean when she is in A-number one shape?

Q. Yes?

A. Smoke stack and safety valves.

Q. And where are the safety valves?

A. Well, they are generally located back on the back end of the boiler, near the cab.

Q. As what you call the pop valves on the engine?

A. Yes, that is a safety valve, pop valve.

Q. And are the valves down underneath?

A. No, they are all on top of the boiler.

Q. All on the top of the boiler?

A. Yes.

Q. Does steam escape from the stack normally?

A. Yes, when she is working.

Q. When an engine is leaking steam, as a locomotive engineer, and you can't repair yourself, what do you do?

Q. Why if it is possible I get her home, if nothing but just a little small leak, report it at the arrival at a terminal.

329 Q. You take the engine to the terminal?

A. Yes, sir.

Q. Now, does steam escape frequently from around the pistons?

A. On an engine in first class shape?

Q. Well, that *want* what I asked you. I asked you if steam ever escaoes from around the pistons?

A. Yes.

Q. And would you expect to run an engine for a year or two or three months without having something of that kind?

A. No.

Q. And when steam escapes from there, do you take it into a terminal and have it fixed?

A. Always have.

Q. Is that the proper way to do?

A. I always thought so.

Q. Comparing that with other engines, do you say that 708 compared favorably with other engines that you have run?

(W. AUSTIN:) We don't think there should be a comparison made with engines that Mr. Preston has run. That is a leading question and not a proper method of showing that this was such an engine as a prudent man would run on that night.

(COURT:) Why, the court has got the impression from the trial that has thus far proceeded, that the plaintiff doesn't make any question but that the engine itself was a properly constructed engine, but that on the that occasion it was out of repair.

(W. AUSTIN:) That is our position.

(COURT:) The position that they have taken—they haven't charged you but that it would compare favorably with them.

330 (AMEY:) If the plaintiff admits that the engine was a reasonably good engine and was fit to do the work.

(COURT:) He can't claim otherwise, can he, under his declaration, only he claims it was out of repair?

(AMEY:) Well, if that is true I don't care to pursue this line of examination.

(COURT:) Well, as it occurs to me it would have no proper bearing on the question.

Cross-examination by Mr. W. AUSTIN:

Q. (Handing witness chart of engine.) I wish you would point out on this chart where the nozzle is that vents the steam into the smokestack? Step down before the jury. (Witness indicates to the jury.)

Q. Now while you are there point out where the safety valves are. Now will you point out where the cylinder cocks are?

(Witness indicates to the jury.)

331 J. E. MAUN, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. What is your business?

A. Railway conductor.

Q. In the employ of whom?

A. Central Vermont Railway.

Q. How long have you been employed by the Central Vermont Railway?

A. 35 years, or about there.

Q. In what capacity have you been employed?

A. Most of the time as a conductor.

Q. How long have you been a conductor?

A. Over 30 years, 33.

Q. And for what portion of that time have you been the conductor of a passenger train?

A. 30 years.

Q. Have you in connection with your duties, become conversant with the standard rules, so called?

A. I have, yes, sir.

Q. You may tell the jury if you have been, or are, an instructor in rules for the railroad?

A. I have done a good deal of that special work at times.

Q. And what is that, John? Tell them just what you have to do.

A. Well, holding schools of instruction and examination with conductors and brakemen, engineers and firemen, agents and operators and others that are required to pass examinations in operating the rules.

Q. You may state whether the Central Vermont Railway is operated under the standard rules?

A. They are.

Q. You may tell the jury what the standard rules are?
A. The standard rules were adopted by what is known as the American Railway Association, my recollection is in about '86. It is an organization composed of——

332 (W. AUSTIN:) Just a minute, Mr. Maun. If Mr. Maun is relating something that he does not know personally, we object to it. Of course I have no doubt Mr. Maun is well informed by reading about such matters, but what is put in print isn't always accurate, and we don't think that this is competent proof of the adoption of these rules by a national organization.
(AMEY:) Well, Mr. Maun I introduce as a professional witness.
Discussion.

Q. Have you read, John, and consulted authorities with reference to the origin of the standard rules?
A. I have.
Q. And do you base your testimony as an expert upon what you have read and studied and observed?
A. I do.

(AMEY:) I would like to have the question read.
(COURT:) Well, while we have some doubt about the admissibility if you want to take it subject to the plaintiff's exception, we shall let you do so, Mr. Amey. We have some doubts about the correctness of our ruling, but we haven't had time to examine it carefully. We will let you take it if you desire, subject to their exception.
Exception by plaintiff.
(Question and answer on previous page read.)

A. (Witness continuing:) Practical railway managers and officials for the purpose of obtaining a uniform system of operation in the railway service.
333 Q. And was that for the purpose of obtaining the safest method of the operation of trains?
A. It was.
Q. And were the standard rules adopted as a result of those conferences?
A. They were.
Q. You may tell me if rule 99 is a standard rule?
A. It is.
Q. And what was the reason for the adoption of rule 99?

Objected to.
Question waived.

Q. Why is rule 99 in force?

Objected to.
Discussion.
(COURT: Hasn't he practically answered that question and under objection when you asked him if they were adopted as the safer means, or for the safety of the conduct of the business? I am in-

clined to think that question you ask now would open a matter that is objectionable.

Q. I desire, Mr. Maun, to call your attention directly to rule 99 and ask you if that imposes absolutely the duty of the flagman to protect the rear end of his train?

Objected to as leading.

Q. I will ask you what duty it imposes upon the rear flagman?

(W. AUSTIN:) Mr. Amey, do you claim that that rule is ambiguous?

(AMEY:) I claim that I am entitled to the opinion of an expert upon the rule because it is something that the lay mind can't understand. It is something that isn't apparent to ordinary
334 observation, and I am doing it for the purpose of showing that this railroad was operating its trains in the exercise of due care at the time of this accident?

(W. AUSTIN:) I would like to ask Bro. Amey if he claims that rule is ambiguous?

(AMEY:) It may not be ambiguous to me or you, but it might be to someone else.

(W. AUSTIN:) Now, then, I would like to ask him if he claims that the ordinary meaning of the words used there is to express the intent of the railroad company in making them.

(AMEY:) I would like to call the Court's attention to this decision on page 947, which I am proceeding under at this time.

(W. AUSTIN:) Are you willing to answer my question? There is no answer, I assume that he is not willing to answer.

(Ques. read.)

(COURT:) What is your objection?

(W. AUSTIN:) Bro. Amey hasn't answered my question. My idea is this, that if a rule is unambiguous and clear and no claim is made that the words in it should be given any other meaning than ordinarily given in the English language, that it is the duty of the Court to interpret the rule and that there is no foundation for expert opinion regarding it.

335 (COURT:) Well, we think that that is a construction of that rule, and if parole testimony is admissible, it is upon the ground that it is ambiguous. That is elementary. And do you claim it to be ambiguous, and if so, in what respect?

(AMEY:) Well, it says — it is ambiguous with reference to "the flagman must go back immediately with stop signals," it says "a sufficient distance to insure full protection, take up a position," etc., "where he will be observed, remain in such position until recalled."

(W. AUSTIN:) If they claim that it is ambiguous, we waive the objection on that ground.

(COURT:) Very well.

(AMEY:) Well, I don't claim that the rule is ambiguous, I claim that it is absolutely plain and unequivocal.

(COURT:) Well, then, we exclude the question.

Exception by defendant.

(AMEY:) I would like to introduce rule 99 in connection with Mr. Maun's examination, Rule 99 on page 28.

(COURT:) Well, it may be received.

Q. Was that rule, Mr. Maun, in force on the Central Vermont Railway Jan. 12, 1912?

A. It was.

RULE 99. "When a train stops or is delayed on the main track under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals, a sufficient distance from the train to insure full protection, at least:

In day time if there is no down grade toward train within one mile of its rear, and there is a clear view of its rear of 2000 yards (40 telegraph poles) from an approaching train, 500 yards, 10 telegraph poles.

336 At other times and places if there is no down grade toward train, within one mile of its rear, 1200 yards, 24 telegraph poles.

If there is a down grade toward train, within one mile of its rear, 1800 yards, 36 telegraph poles.

The flagman, must after going back a sufficient distance from the train to insure full protection, take up a position where there will be an unobstructed view of him from an approaching train of, if possible, 500 yards (10 telegraph poles), first placing two torpedoes not more than 200 or less than 100 feet apart on the rail on the same side of the engineer of an approaching train, 100 yards (2 telegraph poles) beyond such position. The flagman must remain in such position until recalled or relieved.

If recalled before another train arrives, he must at night, or when weather or other conditions obscure day signals, or when snowplows or flangers may be running, in addition to the two torpedoes, leave a fusee burning red at the point he returns from, and at such other points on his return as may be necessary to insure full protection.

The front of a train must be protected in the same way when necessary by the front brakeman, or if there be none, by the fireman.

Flagmen must always on the approach of a train display stop signals, and if not already done, place two torpedoes on the rail as before described, and then return 100 yards (2 telegraph poles) nearer the protected point.

Flagmen must each be equipped for day time with a red flag and four torpedoes, and for night time and when weather or other conditions obscure day signals, with a red light, a white light, and four torpedoes, three red fusees, and a supply of matches.

A train should not stop between stations at a place where the view from following trains is obstructed.

Q. Who is the flagman, where does he ride on the train?

A. To the rear of the train, in the caboose.

Q. What are those torpedoes?

A. Well, they are made to clamp on the rail and they explode when the locomotive wheels strike them or run over them.

337 Q. Do they make a loud noise?
A. Very loud.
Q. Is it practical, Mr. Maun, for trains to be notified at stations of the location of other trains on the road?
A. I don't consider it so.
Q. Why is that?
A. Well, it is impossible at all times to tell where they are located.
Q. Now assuming that a train leaves Bethel station at ten o'clock, another train comes along in ten minutes, could the agent at Bethel station tell the train coming along behind where the forward train is?
A. I don't know how he could.
Q. The speed and all that sort of thing depends on a lot of different conditions, doesn't it?
A. It does.
Q. And if that rule were in force, and also rule 99, would that lead to confusion?

(W. AUSTIN:) We think an attorney ought to avoid leading questions.
(COURT:) Well, you can avoid it, Mr. Amey.

Q. What would be the result of divided responsibility?
A. My opinion is that the parties that would naturally be responsible, would become more negligent by such division.
Q. Now, the plaintiff has introduced several rules in evidence. Rule 99 on page 28. Have you heard all the testimony in this case, Mr. Maun?
A. I have, yes, sir.
Q. Has that rule, so far as the testimony goes, 97, and so far as it had any application, was it observed on the night of
338 Jan. 12?

(Objected to.)
(C. G. AUSTIN:) This is within the province of the jury.
(COURT:) That was practically a question upon which I was reversed in St. Johnsbury; when Judge Palmer was a witness the question was asked if a certain instrument was lawful according to the law of Dakota, and against the objection I allowed the witness to answer. The court said that it was error. Now isn't this precisely the same, practically the same thing, Mr. Amey?
(AMEY:) These rules were introduced by the plaintiff, claiming that they had some efficacy in this case, and claiming that they were binding in this case, and claiming that they indicated another possible negligence on the part of the company. Now, I want to ask this expert the application of this rule.
(COURT:) Well, does that change the rule of evidence, their conduct; the inquiry the Court made was with reference to the rule of evidence. Their course, I don't hardly think changes it.
(Question read.)
(AMEY:) (Reads Rule 97.) Now I want to ask him if the proper orders under the rules were observed that night.

339 (W. AUSTIN:) That is pure hearsay, and it is attempting to make him a judge of the facts of the case. Don't call upon him for an opinion, it isn't evidence at all.

(COURT:) Well we will exclude it, if you want it, subject to their exception.

(AMEY:) I want to make an offer.

(W. AUSTIN:) You need not take the time, it isn't of importance enough to have it stand under an exception, and I waive rather than have the exception.

(COURT:) Well, then, we will receive the evidence. Of course, if you put in this, Mr. Amey, if you open the door, why the other side will have a chance to go in as far as you have gone, so that you should take that under consideration.

(AMEY:) I understand that.

(COURT:) It may be received.

(Question read.)

A. I didn't notice any non observance of it in the testimony that was given.

Q. And you have heard all the testimony given?

A. I have.

Q. Now, I will ask you if rule 91 was in force on Jan. 12, 1912, Rule 91, page 25?

(W. AUSTIN:) We have proved that those rules were all in force.

(AMEY:) Well, if you admit that they were all in force I
340 won't ask that question.

(W. AUSTIN:) Why, of course.

(AMEY:) All right then, I will withdraw that question.

Q. I will ask you if Rule 91 is used in connection with what is called a clearance card?

A. Well, I should say that the clearance card was used in connection with the rule.

Q. And whether the clearance card is for the purpose of keeping trains apart?

A. It is used for that purpose.

Q. And is there a rule in the book that requires trains to be kept five minutes apart?

A. There is.

Q. And what is that rule, what number, isn't that 91?

A. Rule 91, yes, sir.

Q. I call your attention to Rule 103, and ask you if from your knowledge of the testimony that rule was observed on the night of Jan. 11, and the morning of Jan. 12 by these trains?

A. I didn't notice any non-observance of it in the testimony.

Q. I call your attention to Rule 220 and ask you if from your knowledge of the testimony you observed that that rule was violated on the night of Jan. 11, and morning of Jan. 12, 1912, by these trains?

A. I didn't notice any violation of it in the testimony.

Q. I call your attention to Rule 221, on page 40, and ask you to read that carefully and tell us if you noticed in the testimony any violation of that rule on the night of Jan. 11, and morning of Jan. 12, 1912?

341 A. I did not notice any violation of it in the testimony.

Q. And you heard all the testimony?

A. I did.

Q. Rule 222, on the same page, did you notice any violation of that?

A. I did not.

Q. Rule 324, you may tell me what page that is?

A. Page 160.

Q. Did you notice any violation of that rule in the testimony that you heard?

A. I did not.

Rule 91. "Unless some form of block signals is used, trains in the same direction must keep at least five minutes apart, except in closing up at stations, but a train must not follow a train carrying passengers, or operating a snow-plow until a report is received of its arrival at a station ahead, except that a train may follow twenty minutes after the departure of a train carrying passengers, or operating a snow-plow, when either the station from which it is to follow or the next station ahead is not a telegraph station, or when communication with the train despatcher is interrupted, and the wire failure is noted on the clearance.

The train order signal will be used by operators to maintain the intervals required by this rule.

Schedule speed must not be exceeded by sections of trains other than the first section, nor may a train following a train carrying passengers, exceed the schedule speed of such train unless clearance shows arrival at a station ahead."

Q. I will ask you if block signals are used on the Central Vermont, if you have the block signals?

A. There is no automatic block signals, no.

Q. Do extras travel on a schedule?

A. They do not.

2.00 P. M.

Q. I show you Plaintiff's Ex. Y and ask you to tell what it is?

A. Clearance card.

342 Q. Where is that issued, out of what station?

A. I should say it was W. R. Junction. It is difficult yo read it.

Q. Well, I understand it, that is the clearance card that was given at Bethel, isn't it, there isn't any question about that. And what does that word there "displayed for orders" mean?

A. I can't seem to read it in that way.

Q. Well, supposing it says in there, "displayed for orders", I believe that is the way it is in the case, what does that mean?

A. This clearance card was given at sometime to extra 413, the next train ahead is 433.

Q. That is the wrong one. I show you plaintiff's exhibit R and ask you what that is.

A. This is a clearance card.

Q. And does that say on there "displayed for orders", what does it say about that?

A. It does. "Signal is displayed for orders".

Q. What does that mean, Mr. Maun?

A. Well, that means that that was to be delivered with a train order.

Q. Now, Mr. Maun, you note that the preceding train isn't mentioned in there?

A. Yes, sir.

Q. Now, assuming that this order, this clearance card, was given to 708 at Bethel, and assuming that 401 had left twenty minutes or more prior to that time, would it be necessary to have the time in there, have the location or time that the preceding train left that station in there?

343 A. It is my opinion that it isn't.

Q. And you are speaking now as an expert on rules?

A. Yes, sir.

Q. Do you construe that in connection with some rule in the book? Give that opinion?

A. In connection with all rules, yes.

Q. Are you construing that in connection with Rule 91, if you recollect what it is?

A. I am, yes, sir.

Q. I show you plaintiff's Ex. Q. and ask you what that is?

A. That is a terminal clearance.

Q. What is the difference between a terminal clearance and the clearance which you have just read?

A. One is issued at the different terminals, the other at local stations along the road.

Q. Now, sir, does that clearance card show the location of the preceding train or when it left the terminal?

A. It shows "Extra 216 left at 9.52 P. M."

Q. Now I want you to tell me why it is necessary to have the time stated there and not in the other when the preceding train left?

A. Well, that engine 216 is a passenger engine, and I assume that that was some passenger special, although I don't remember any evidence to that effect, that would change the conditions.

Q. If it were a passenger special, or a passenger train, would it alter the situation?

A. It would.

344 Q. In what respect, you may tell the jury?

A. Passenger trains or trains carrying passengers are blocked from station to station where offices are open. Where they are not open, there is a twenty minute block which is a great deal more than blocking freight trains.

Q. Is that required by the rules?

A. Yes, sir.

Q. What rule is that?

A. The same rule 91.

Q. I am going to ask you a long question, and if you want a part of it repeated, I will repeat it to you. Two extra freight trains left White River Junction coming north on the main line of the Central Vermont Railway on the 11th day of January, 1912. Assume that 401 left at six o'clock P. M., and that 708, the other, left at 10.12 o'clock P. M.; assume that 401 was delayed on the road between White River Junction and Bethel at West Hartford for some time, and delayed at South Royalton from 9.20 to 11.00 P. M.; assume that 401, the preceding train stopped at Bethel at 11.52, and left at 12.15; assume that 401 arrived at Randolph at 12.50, and departed from Randolph at 12.54 on the morning of January 12; assume that from Randolph to the place of accident 401 made an average speed of from eight to nine miles per hour; assume further that from White River Junction to the place of accident the flagman of 401 put out no torpedoes or fusees at any place; assume that 708 arrived at Bethel at 12.30 and departed
345 from Bethel at 12.36, arrived at Randolph at 1.00 o'clock, and departed from Randolph at 1.00 o'clock on the morning of Jan. 12; assume further that the engine 708 was leaking steam to some extent and at times it blinded the engineer so that he could not see ahead; asume that at a point 1.625 miles or 1 4/5 miles west of Randolph depot, 708 ran into the rear end of 401 and by the impact killed the plaintiff's intestate, flagman White of 401—what should flagman White have done that he failed to do to protect the rear of his train?

(C. AUSTIN:) The hypothesis isn't correct at all, even if it is an admissible question.

(Discussion.) (Objection withdrawn.)

Q. I will put that from eight to ten miles per hour.

A. Well, I should say in the first place, he failed in not leaving torpedoes and a fusee at Randolph, and it seems to me that same condition would apply if they were moving very slow all the way from there to the point of the accident.

Q. What do you mean that he should have done from Randolph to the point of the accident?

A. He should have left, if they were running slow, additional fusees and if they slowed down to the point where it became dangerous, should have got off the train with proper signals to protect his train.

346 Q. Now, you may tell the jury what these fusees are?

A. Well, they are something in the shape of a large candle, about as long as that (indicating) and they can be ignited by friction. There is a cap on top of them, with something similar to sand paper on it. You can pull that cap off and rub it with the end of the fusee after removing the cap, and it will ignite, and it is filled with a substance that burns red for five minutes, and then it will shift to yellow, and the next five minutes it will burn yellow, and with a train standing—there is a brad in the other end to be stuck in the tie or in the ground, and they can be dropped from

the tip of the train; sometimes when dropped from the train they will stick up in the track, and sometimes they will fall down, but they will burn falling down, just the same, but possibly won't show up quite as bright as they would if they were stuck up in the track, at least, first when they commence to burn; after a little, I don't know as it makes any difference whether they are laying down or sticking up, but they won't start off quite so bright as they will if they are stuck up.

Q. Did you tell the jury how long those burn.

A. Five minutes red, and five minutes yellow, ten minute fusee.

Q. Now will you describe a torpedo?

347 A. Well, a torpedo is, it is round and flat and I suppose the exploding substance in it is some form of dynamite, and it is made of tin, and then there is two clamps on it to be clamped down over the rail, and then it lays flat on top of the rail and when an engine or car strikes it, it will explode, making a very loud noice.

Q. Assume in addition to what I have already stated to you, in the former hypothetical question, that White was directed at Randolph by his conductor to protect the rear end of his train, what was it then his duty to do at Randolph?

A. Go back the required distance, place torpedoes on the rail and when recalled, leave a fusee burning in addition to the torpedoes.

Q. Assume what I have previously stated in the two hypothetical questions, and assume further that the conductor of 708 received a 19 order and clearance card at Bethel; that the clearance card is Plaintiff's Ex. R. which you have read; that it did not state the time when 401 left Bethel—Would it still have been the duty of Flagman White to protect his train at Randolph as you have stated?

(W. AUSTIN:) Well, we object to that, because that includes in the hypothesis something that it is perfectly clear Mr. White knew nothing about.

(AMEY:) Don't make any difference.

(W. AUSTIN:) He didn't know that 708 hadn't received the proper clearance card.

348 (AMEY:) I want an exception to that statement, I want an exception to the statement of my brother when he says that that wa'n't a proper clearance card.

(W. AUSTIN:) That is our claim.

(AMEY:) I want an exception to it.

(COURT:) You may have an exception to it.

Exception by defendant.

(Mr. Warren Austin waived objection to question.)

(Question read.)

A. It would.

Q. Assume further, including the questions that I have previously asked, and in addition thereto that a short time prior to the accident Flagman White was inside the caboose sitting down lighting his pipe, was he in his proper place and was he doing his duty?

(COURT:) That question is asked as a construction of the rule or as knowledge of railroading?

(AMEY:) Knowledge of railroading and a construction of Rule 99 too.

A. I should say that he was not.

Q. Where should he have been?

A. Somewhere in position where he could watch toward the rear.

Q. Assume what I have already asked, and further, that is, what I have already asked in the prior hypothetical questions, and further that Flagman White had worked for the company during
349 the last engagement since Dec. 9, 1911, and knew that trains were frequently running over the road in both directions——?

(W. AUSTIN:) We-, there isn't any evidence of the kind.

(COURT:) Well, I think that that is going beyond the scope of the testimony, Mr. Amey, we will exclude that.

(AMEY:) I want to make an offer.

(W. AUSTIN:) If he has got to fuss with it, let's have the answer and get it over, because it is along the same line and don't amount to anything.

(AMEY:) I don't like my brother's remark and I want an exception to it.

(COURT:) Well, an exception may be noted and we will receive the answer.

Exception by defendant.

(Question read:) Did he do his duty at Randolph and from Randolph to the scene of the accident?

A. It is my opinion that he did not.

Q. Assume what I have already stated in the previous questions, and also that he was a competent man and understood his business, namely, that of a flagman, did he do his duty at Randolph and from Randolph to the scene of the accident?

A. It is my opinion that he did not.

Q. It is more conducive to the protection of men, to the protection of employees, to require the men to protect themselves at all times without notice of the whereabouts of other trains than
350 it is to undertake to give them notice of the location of other trains on the road?

A. I think that it is.

Q. If the rules of the company required that notice be given at different stations along the line of the whereabouts of preceding trains or of following trains, whether it would cause the employees to relax their vigilance, I mean the rear flagman to relax his vigilance, and be conducive to accident?

(Objected to as leading, objection withdrawn.)

A. I think that it would.

Cross-examination by Mr. WARREN AUSTIN:

Q. Mr. Maun, you have known for some time have you not what these questions were that have been asked you by Mr. Amey?

A. Not for any length of time, no.

Q. And for that same length of time, whatever length it is, you have known exactly what your answer was going to be?

A. After looking it over carefully, I formed an opinion of my own what I would answer, or how I would answer.

Q. And Mr. Amey knew just exactly what your answer would be on those questions?

A. I don't think so.

Q. Weren't those questions all written out and read over by you?

A. They were, yes, sir.

Q. Now, you speak of these rules being adopted for the purpose of safety. I want to know, Mr. Maun, if these rules can
351 effect their purpose if they are not obeyed?

A. They cannot.

Q. And is it not just as important that one rule should be obeyed as that another should be?

A. They should all be obeyed.

Q. And isn't it a violation of the entire rule if you transgress a part of it?

A. It is.

Q. And when you undertake to construe and say what the meaning and effect of a rule in that book is, you have to take into consideration the entire rule, do you not?

A. We do.

Q. You can't ignore a part of it as meaningless and not to be taken into consideration, can you?

A. Cannot.

Q. And when a state of circumstances are printed in that book under which certain rights or certain duties shall arise to or by an employee, those circumstances must exist in order to give him that right or to impose upon him that duty, must they not?

A. They should.

Q. And if they do not exist, then that right or that duty does not exist, does it?

A. Does not.

Q. And you wouldn't regard it safe to ignore any part of any of those rules, would you?

A. I wouldn't.

(W. AUSTIN:) I desire at this time to read Rule 15 on page 17.

(AMEY:) I don't think that is cross-examination.

352 (W. AUSTIN:) Laying the foundation for a question.

(COURT:) Do you object?

(W. AUSTIN:) If he objects, I will postpone it until rebuttal.

(AMEY:) No, you may go ahead if you want to. Go ahead, I haven't any objection only that it is out of order, that is all.

Rule 15.—"The explosion of one torpedo is a signal to stop; the

explosion of two not more than 200 and not less than 100 feet apart is a signal to reduce speed and look out for a stop signal.

Torpedoes must not be placed near stations or public crossings nor where persons are liable to be injured by them."

Q. You don't profess, do you, Mr. Maun, to know whether Mr. White set up a fusee at Randolph, do you?

(AMEY:) We don't pretend to know anything about it. I object to the question.

(COURT:) He may answer.

Exception by defendant.

A. I do not.

Q. Will you please refer to pages 122 and 123 of the rule book. Now, on page 123 occurs a form of terminal clearance, does it not?

A. Yes ,sir.

Q. And the direction what must be done with it and to it in order to comply with the rules of the company, is that not so?

A. Yes, sir.

353 Q. Now, will you please point out to me what there is on page 123 that distinguishes that form of clearance card from Form A Clearance Card with reference to inserting therein the time when the next train ahead passed the station at which this clearance is given, or left the station?

A. Just the same.

Q. They are identical, are they not?

A. Yes, sir.

Q. And you wouldn't regard it safe, would you, Mr. Maun, to disregard any of the rules of the company?

A. I would not.

Q. Neither would you put a construction on any rule of the company that would be ridiculous, would you?

A. I would not knowingly.

Q. Not, isn't there another purpose for which these rules are promulgated?

A. For the purpose of operating trains with safety and despatch.

Q. To facilitate the movement of trains is one of the purposes of those rules, is it not?

A. Yes, sir.

Q. And you wouldn't put a construction on those rules that would absolutely prohibit the movement of the trains, would you?

A. I would not.

Q. You wouldn't put a construction on those rules that would take the entire train crew off from a train and leave it stripped, would you?

A. I would not.

Q. You wouldn't put a construction on those rules that would leave the rear end flagman on the track somewhere while the

354 train went off and left him, would you?

A. It is often done.

Q. You wouldn't put a construction on those rules that would send a member of a train crew out in the cold when the temperature

was down to 5 degrees below zero, unless there was need of it, would you?

A. I don't think the weather conditions ever enter into the duties of the flagman.

Q. Then disregard that wholly, and tell me whether you would have the member of a train crew get off from a moving train and leave it without cause?

A. I would not.

Q. And who shall be the judge of whether there is cause for flagging on a moving train?

A. I don't just get that question.

(Question read.)

A. My experience in the railroad service has been that that rule is left sometimes to the Courts, sometimes to the Public Service Commission, sometimes railroad officials.

Q. Well, it doesn't make any difference, does it, whether it is in a court of law in a suit for damages for the death of an employee or whether it is out there upon the railroad track running a freight train, the man who does pass judgment upon the duty of a member of a train crew must construe those rules reasonably, must he not?

A. He must.

Q. And he must take into consideration the consequences of his construction, must he not?

A. He must.

355 Q. And if that is going to result in an absurdity, he must not so construe the rules, must he?

A. He must not.

Q. But let's get back to the train, of course we are here trying a lawsuit. My question was directed to the conditions on a train, a freight train like this 708 and this 401 on January 11 and 12. Who is the judge of whether it is necessary and proper to get off from a moving train and go back and flag?

A. I can't answer that.

(AMEY:) It is a matter of positive duty, I object to the question. I object to the question because it is incompetent and immaterial, it is not a matter of judgment, it is a matter of positive duty, he should abide by the rules.

(COURT:) We think he is asking him for a fact, whose duty it is to decide who shall get off the train and go back if anyone is to get off. The question may be read to the witness and the answer received.

Exception by defendant.

(Question read.)

A. Well, if left to the judgment of the flagman, he might err in judgment.

(W. AUSTIN:) I ask to have that stricken off.

(COURT:) That don't answer the question, if may be stricken off and the question repeated.

(Question read.)

A. If the flagman is qualified and is willing to perform his duties, he ought to be able to judge.

356 (W. AUSTIN:) Well, that isn't an answer to my question.

(COURT:) That don't answer the question.

(Question read.)

A. I don't know how to answer that. I don't know as I get the right meaning.

(COURT:) Well, then, you can ask another question.

Q. Mr. Maun, you have had thirty years' experience as a railroad man?

A. I have, yes, sir.

Q. If you as such railroad man, conductor, teacher of the rules, expert witness on the rules, can't say who is to be the judge of what is necessary to do, of whether it is necessary to get off from a moving freight train and flag it, could you ask a freight brakeman to know?

(PALMER:) I want to interpose an objection, and I don't care to get into any controversy over this, but our contention is this, that where the rules prescribe certain conditions, existing conditions, and then prescribe that it is the flagman's duty to perform certain duties under such conditions, there is no discretion left and the question as to whose duty it is to judge whether it is right or wrong to do it doesn't exist in the case. The rules are positive that when certain conditions exist, then it is the duty of the flagman to get off and do certain things. Now, he hasn't any discretion about it, and he hasn't any right to say that, I should guess it isn't my duty to do

357 it, or that I guess I will wait a little while before I do it. The Rules say that when condition exists, you get off and you put a torpedo down there, if you don't then you are failing in your duty; and it is not a question of discretion. I am not surprised Mr. Maun can't answer that question, no man on earth can answer it intelligently, and I desire an objection to the question as improper in form and assuming something which does not exist, and that it is incompetent.

(COURT:) We think your position is pretty nearly sound, but Mr. Amey's examination has opened that door, we thought so when he was making the inqury. Having made it, we think that the counsel for the plaintiff has the right to go into that branch on cross-examination, and we allow the question, and an exception may be noted for the defendant.

(Question read.)

(COURT:) Perhaps the last part of the inquiry I misunderstood. I understood it to be if it was his duty, with reference to his duty.

(W. AUSTIN:) I will ask another question.

Q. We have in consideration in asking this question what you have testified to regarding the rules, and I assume in asking the question that you are very familiar with them and I want

358 to know who upon a moving freight train shall be the judge of whether the time has come or the occasion has occurred

when it is necessary to get off from a moving freight train and go back and flag?

(PALMER:) I would like to interpose the same objection as to the last question.

(COURT:) Well, the same ruling, and the answer may be received. Exception by defendant.

A. I should say that it would be the duty of the flagman to comply with the rules.

(W. AUSTIN:) That don't quite answer the question.

(COURT:) That hardly answers the question, you have been construing the rules, and he is now asking for a construction.

A. Well, I don't think I get the right meaning, I don't understand the question, who should be, who should judge.

(COURT:) Well, then, put the question so he can understand it, if he can.

Q. I suppose somebody on a moving freight train has a duty, and a responsibility to say when the time has come or the occasion occurred when the train should be protected by a flagman at the rear, has he not?

A. Yes, sir.

Q. Now, who is it?

(PALMER:) I would like the same objection.

(COURT:) The same ruling.

359 Exception by defendant.

A. It is the duty of the flagman to protect his train.

Q. That don't answer the question, that is decided——

(AMEY:) I think it is an answer to the question.

(COURT:) Well, that don't hardly answer the question.

(COURT:) He wants to know who decides that question.

A. Why, I can't answer it, only that the rules decide it.

(W. AUSTIN:) Then do you mean to say that you don't know who has that duty on a freight train?

(AMEY:) I object to that. I want the witness treated fairly, and I am bound to see that he is. He says the rules decide it, and the rules are fixed and plain and explicit, there isn't any question about it at all.

(COURT:) Well, we will receive the answer.

Exception by defendant.

(Question read.)

A. Well, it is the duty of the flagman.

Q. Then after all this inquiry, you mean to have this jury understand that the flagman is the sole judge on a freight train of the time when or the occasion when it is necessary and proper to get off from the train and flag it at the rear?

A. I didn't say that at all.

Q. That is what I want to know. Mr. Maun, I am not trying to use you unfairly, if you don't understand what I am driving at, I want to know it, because I want to get an answer to the interrogatory, and I think you can answer it.

360 A. There is a difference between the duty and the judge.

Q. Well, then, if that is what is embarassing us, I will ask the question in a different way. I want to know who is the judge, who is the man on the train who determines that fact—not necessarily who is the man who gets off and goes and performs it, but the man who decides and says that circumstances have occurred which will make it necessary to protect the rear of this train?

A. I don't see how I can answer that differently than what I have.

Q. I want to understand you now; you have answered once that it is the flagman, and I want to know if you mean that. Do you mean that it is up to the flagman to decide whether the time has come to get off and go back and flag?

A. I answered it was his duty.

Exception by defendant.

Q. Well, you mean his duty to flag, that is what you mean, and that don't answer my question. I want to know whose duty it is to determine that matter?

A. It is the flagman's duty.

Q. To determine it, is it?

A. To comply with the rules.

361 Q. Well, is he the sole judge on that train of whether the circumstances exist under which he ought to go back and flag?

A. Why there is a certain responsibility attached to the conductor.

Q. Now we are clearing away the clouds, aren't we? Who do you say now is the man responsible for the performance of that duty, the man who must say whether the circumstances have arisen and exist under which it is necessary to protect the rear of a train?

A. The flagman would have to be responsible for the protection of the train because the conductor's duties call him elsewhere.

Q. Then you want to leave it that it is the flagman's duty, do you?

A. To protect his train, yes.

(COURT to the witness:) That isn't an answer to his question Mr. Maun. He wants to know who is to decide.

(AMEY:) Now, if the court will pardon me just a moment——

(COURT:) There is nothing before the court now.

(AMEY:) My objection is to the repeating of these questions for the reason that the witness has said repeatedly that the duties of the flagman are fixed by the rules, and there is no discretion about it, and that the rule tells him when he must do this thing, and he must do it.

(COURT:) He is asking him to construe the rule.
362 (AMEY:) No, that is not a construction of the rule.
(COURT:) We think it is. We have been so ruling.

A. It is his duty.

Q. To determine whether the circumstances have occurred and exist under which he should go back and flag, is that so?

(AMEY:) I want to save that, on the ground stated.
(COURT:) Yes, you have an exception.
Exception by defendant.

A. I wouldn't want to answer that he could deviate from the rules in so doing.

(COURT to the witness:) He is asking you if the rule requires him to decide that.

A. If the rule requires him to decide it, it is his duty.

Q. That is what I am asking you, I am taking into consideration all that you have testified to about these rules. Now, what I want to know is—you have placed certain constructions on them, do you put this construction on them, that it is the flagman's duty to determine when the circumstances have occurred under which it is necessary to get off from a moving freight train and flag it?

A. It is his duty.

Q. And if he doesn't know those circumstances then he ought not to get off, should he?

(PALMER:) That question is objected to as incompetent and assuming something, if your Honor please, that isn't in this case in the shape of evidence.
363 (COURT:) Well, we will receive an answer to it and an exception may be noted for the defendant.
Exception by defendant.

(PALMER:) And especially I would like to object to the method of the counsel asking his questions in the attempt to intimidate the witness on the witness stand.

(W. AUSTIN:) Intimidate Mr. Maun! I don't think so. We are old friends, Judge.

A. Well, it seems to me that is rather of a broad question.

Q. Well, it is, but I want you to answer it, Mr. Maun.

A. I am not broad enough.

Q. Well, let's narrow it down then. If he doesn't know the particular circumstances exist that make it necessary for him to get off from the train and go back and flag, then he ought not to get off from a moving train and go back, had he?

Same objection and exception by defendant.

A. Well, when a train is moving very slowly, there is a condition of circumstances that would require——

(W. AUSTIN:) That doesn't answer my question. I would like to have that stricken out.

(COURT to the witness:) We-' that hardly answers it. If you

can't answer it, say so, and then the counsel will proceed to some other question.

(WITNESS:) The question is too broad, your Honor.

364 (COURT:) You can't answer it, can you?

A. No.

(W. AUSTIN:) All right, we will ask something else.

Q. In the face of known and certain danger to human life existing in spite of the safeguards provided by the rules, are employees bound to exercise intelligence, vigilance and prudence to protect human life in addition to what is provided in the rules?

A. They are expected to.

Q. And if a vice-principal of this defendant railroad company on that occasion when these two trains were still running and still behind a station at which there was an operator awake attending to his business, knows or has reason to know that one train is bound to overtake and run into the other if not stopped, then he should disregard rules if necessary to save human life, should he not?

(AMEY:) I object to that because there is no such situation as that delineated in this case anywhere, absolutely not.

(PALMER:) And the question of vice-principal is not involved under this law.

(W. AUSTIN:) I don't claim it is.

(COURT:) This is cross-examination and as the court has said, it doesn't need to be material if it is cross-examination. We think this is examining this man whom you have produced as a witness upon the stand as an expert to construe these rules, and this

365 examination bears upon the weight that is to be given to his judgment upon the construction of these rules, and we think it would be error to exclude it.

(AMEY:) Let us have an exception.

(COURT:) We have given you one to everything lately, and we will this, and all this examination, to save your interruption, with reference to his qualification as an expert, why, we will receive subject to your exception.

(PALMER:) That is satisfactory.

Exception by defendant.

(Ques. read.)

A. I don't understand that that condition existed.

Q. Well, now I know that is your position here in the trial of this case, Mr. Maun, but my question doesn't assume what you have in mind. Just consider my question alone and nothing more and answer it.

A. I never believed in the practice of giving trains information of the location of other trains.

(Answer stricken from record).

(Ques. read.)

A. Well, if he had reason for thinking that condition existed——

Q. You would say yes?

A. I would say yes.

Q. Well, that is just what I have assumed in my question. Other-

wise he would be placing the rules of this Company upon a plane far above human life, wouldn't he?

Objected to. Question waived.

366 Q. Now you know, do you not, that there was an operator at Bethel that night?

A. I understand so, from the evidence.

Q. And an operator at Randolph that night?

A. Yes, sir.

Q. And each of these stations was equipped both with telegraph and telephone instruments, were they not?

A. They were.

Q. And they were in communication with the train despatcher at the city of St. Albans?

A. Yes.

Q. And he knew when 401 arrived at South Royalton, when it left South Royalton, when it arrived at Bethel and when it left Bethel, when it arrived at Randolph and when it left Randolph; he knew also when 708 arrived at Bethel and when it left Bethel, and he knew when it passed Randolph, isn't that so?

A. Yes.

Q. And he knew how fast each train was running because he had it right in front of him on "Pl'ff's Ex. 1 and H" didn't he?

A. Well, that sheet would show that the principal cause——

Q. I am not asking that. Just notice the question.

(COURT:) The sheets would show that fact, wouldn't they?

(W. AUSTIN:) Yes, the sheet does show that fact.

Q. I show you "Def't's 2" and ask you what that is?

A. That is a fusee.

Q. And which is the end that you put in the ground or in the tie?

A. This end (indicating).

Q. How are those operated?

A. Take hold of this tube right here like that, and give it a snap so that it takes this cap right off, and then you turn
367 this end of the cap against the top end of the fusee and rub it like that, just like a match and it will ignite. Do you care to have me show how it works, it doesn't harm any. (Witness removes cap and illustrates).

Q. How far down does it burn red?

A. Just about half of it, down to here (indicating).

Q. And what is the balance of it, what color?

A. Yellow.

Q. Now, then, after having ignited that how is it landed on the rail, or placed in the rail?

A. Well, if the flagman is on the ground he sticks that right in the tie, or he can stick it in the iron or in the dirt. If he drops it from the rear they calculate to drop it this way so that they will try and stick them up. If they are going slow you usually can, and if it should fall down it will burn just the same. The wind won't blow it out.

Q. Is that a signal for the train following?
A. It is, yes.
Q. I show you "Def't's Ex. 3" and ask you what that is?
A. That is a torpedo?
Q. Is that the explosive about which you were talking?
A. It is, yes.
Q. And you may come down and show the jury how that is adjusted to the rail. (Witness illustrates). Is that a particularly dangerous implement?
A. It is.
368 Q. In what respect?
A. Well, those pieces will fly when it explodes.
Q. How far will they fly?
A. Well, they will fly sometimes very apt to, and if placed at a highway crossing a heavy wagon might explode it if it struck, that is the objection.
Q. But they don't injure the man in the cab any, do they?
A. Oh, no.
Q. Might anyone as far as I am from you?
A. Wouldn't be apt to. Might cut a horse's leg if the wagon exploded it going over a crossing, far enough for that.
Q. Is that the kind of a lantern that is used in the night by a flagman (showing witness lantern)?
A. It is, regulation red light.

369 EDWARD F. LUCAS, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. Are you paymaster of the Central Vermont Railway Company?
A. Yes, sir, I am.
Q. And were you the paymaster in January, 1912?
A. I was.
Q. And were you the paymaster in 1910?
A. I was.
Q. And have you been the paymaster from 1910 up to the present day?
A. Yes, sir, I am.
Q. You may tell the jury if you have examined the wage record of Enoch L. White?
A. I have.
Q. And have you examined it for the different periods in which he was employed by the company?
A. I have.
Q. You may consult such memoranda as you have and you may tell the jury the amount earned for the different months that he was employed by the company and give the dates.
A. Our pay rolls are weekly, and the different periods—do you want the totals or by periods?
Q. Want it by periods.

A. February, 1910 was $10.81; March 8, $8.32; March 16, $8.51; March 24, $6.46; March 31, $3.84; total $27.13 for March. April 8, $4.56; 16, $13.87; 24, $16.79; 30, $15.07, making a total for April of $50.23, April, 1910, and these are all 1910. Mary 8, $18.24; 16, $1.66; 24, $12.92; 31, $7.67; total for May, $40.49. June 8, $13.07; 16, $12.65; 24, $9.71; 31, $7.79; total for June.
370 $43.22. July 8, $18.45; 16, $12.05; 24, $3.35; total, $33.85. He don't appear to have worked after the last date. August 8, $13.56; 16, $18.34; 24, $9.06; 31, $5.70; total for August, $46.68. September 8, $16.66; 16, $20.12; 24, $14.27; 31, $11.89; total for September, $62.94. October 8, $24.74; 16, $6.43; 24, $17.49; 31, $16.58; total $65.24. November 8, $9.05; 16, $14.85; 24, $11.70; 31 or 30, $13.88; total for November, $49.48. December 8, $18.06; 16, $8.92; it doesn't appear *his* work- the 24th or 31st, making a total $26.98. January, 1911, 8th, $15.92; 16, $19.97; 24, $20.94; total for January, $53.63; February 8, $15.03; it don't appear that he worked in February.

Q. That is February, 1911?

A. 1911. December, 1911, December 8, $15.38; 24, $15.26; 31, $12.95; total $44.09.

Q. That is the total for December, 1911?

A. For December, 1911. January, 1912, January 8, $9.36; 16, $6.73, total $16.12. $.67 is due yet, non-payment of wages down there for the 24th, over time.

Cross-examination by W. AUSTIN:

Q. As a result of a strike here, was there an increase in the wage rate made?

A. I think there was.

Q. And when did that go into effect?

A. I really couldn't tell you the date.

371 Q. Wasn't it the 1st day of January, 1912?

A. I couldn't say.

Q. And were not the wages of freight brakeman increased at that time?

A. I think they were.

Q. But your pay-rolls do not include any pay that was covered by that increase, do they, that you have shown here?

A. I couldn't say that.

Q. Isn't it a fact that there is pay from the time of the settlement of the strike down to the time when Mr. White was killed still owing him by the railroad company that isn't paid him?

(Objected to. * * * Objection waived.)

A. Well, as I stated there before, there is $.67 in unclaimed wages on the pay-roll. The pay-roll is all that I have to deal with, but I have seen a voucher, it is in the hands of the cashier which I understood was for settlement of strike pay or something of that sort.

Q. And that is in addition to what you have been testifying about?

A. Yes, that is there, it isn't paid, ready to be paid.

Q. From the time when that strike was settled, and from January 1, 1912, a scale of wages went into effect, did it not?

A. I assume so, yes, sir.

Q. Quite a good deal higher than the rate at which he was paid, according to these pay-rolls that you have shown?

A. Why, yes, I think that was the idea, I think that
372 was what the voucher called for.

Q. You don't have to do with the making up of the pay-rolls or the time?

A. No, sir, not at all.

Q. All you do is to take the pay-rolls as they are handed to you and pay the men?

A. They come to me from the Auditor ready for payment.

DANIEL MCDONALD, called for further cross-examination:

(W. AUSTIN:) I show you work-book pages marked "Z-1 to Z-4," and ask you to look that over and then tell us if that refreshes your recollection. What do you say, does it refresh your recollection?

A. That is my writing.

Q. Now, did you on the 5th day of January, 1912, report the right valve stem leaking?

A. Yes, sir.

Q. And was she leaking elsewhere?

A. I booked her stay-bolts to be caulked.

Q. What does "put gasket in front over-pass" indicate?

A. That was a leak.

Q. The over-pass is on top or in the steam chest, is it?

A. Outside of the steam chest.

Q. Will you please indicate where it is, step down to the jury and show them? Indicate where on a compound it would be. (Witness indicates.) And now, these stay-bolts that were caulked, if you will indicate about where they are.

A. Don't get them in this engine.
373 Q. Well, the general location.

(Witness indicates to jury.)

Q. Now, on January 7, 1912, was this engine also leaking at the right valve stem?

A. Yes, it was booked to be packed on that day.

Q. And was she leaking in the over-pass?

A. Yes, sir.

Q. That is this same?

A. Same overpass here within the cylinders.

Q. Near that same chest. Wa'n't she leaking in the cross-over pipe under tender?

A. Not steam.

Q. Now, on January 10, was she leaking at that right valve stem?

A. Yes, sir.

Q. And now on the morning after the accident, did you report her to "pack all valves in cab"?
A. Yes, sir.
Q. Did you report her to "turn right valve stem so it will not leak"?
A. Yes, sir.
Q. "To pack the left piston"?
A. Yes, sir.
Q. And to "put a gasket in right injector"?
A. Yes, sir.
Q. That is the water connection, isn't it?
A. Steam connection.
Q. Is it a steam connection? Point out where it is.
A. Well, it isn't on this.
Q. So that every run you made with that engine previous to this accident from the 5th day of January, she was leaking at those places, was she?
374 A. She was leaking at the places booked on the book.
Q. Yes, that is what I mean, and do you remember whether you reported her at the White River Junction end also?
A. If she was leaking, yes.
Q. Now, did you run any other engine except 708 during that month from December 12, 1911, to January 12, 1912?
A. Oh, I think so, I don't think I got that engine until along about the 25th.
Q. And now you say it was about how often that you reported your engines for repairs?
A. Every trip.
Q. If you reported them, they would be recorded in these two books, wouldn't they?
A. Yes, sir.

(W. AUSTIN:) I want to offer both of these books in connection with the cross-examination to show how many times he actually did report an engine for repairs.
(AMEY:) Why, I object to it only because it is entirely extraneous matter. I haven't objected to his showing about this engine, but the frequency in which repairs are required depends upon a good many things, depends upon how much the engine hauls, the mileage it makes, and it seems to me that to show here the repairs made on some other engine wouldn't be at all material. I should view it that way.
375 (W. AUSTIN:) The question in direct examination that this is aimed at related to other engines. It didn't relate to this engine 708 alone, the attempt being made to show that it wasn't anything strange at all for 708 to be booked for the packing of that valve stem every day for a week before this accident, and the witness then replied As often frequently as six days out of seven that he reported the engine for repairs. Now, we offer to show by these books that only on two or three occasions during

the whole month other than those on this engine that he didn't report an engine for repair.

(AMEY:) Well, if the court will permit me just a moment, it doesn't make this company negligent to have engines reported for repairs. It can't be an item of negligence. The only place where negligence could be cast upon this company would be in not making the repairs when the engines are reported for repairs, because engines must necessarily get out of repair, can't use any kind of a machine without its getting out of repair.

(W. AUSTIN:) That isn't the object of it.

(COURT:) No, I don't understand that Mr. Austin offers
376 it for that purpose. He offers it in connection with this witness' testimony, now on cross-examination, as bearing upon his testimony in chief.

(AMEY:) As impeaching evidence?

(COURT:) Well, as explaining it, and as not strictly contradicting it. Isn't it that?

(W. AUSTIN:) No, it attacks the accuracy of his statement made this morning.

(AMEY:) Well, it is offered as impeaching evidence then.

(W. AUSTIN:) Well, you may call it that.

(AMEY:) Well, that is all right, if that is so I haven't any objection.

(COURT:) Well, then, we will receive it, I wouldn't receive it as independent proof but in connection with his testimony.

(W. AUSTIN:) In connection with his testimony.

(AMEY:) I understand you have to indicate the pages that you want to introduce here.

(W. AUSTIN:) Well, I indicate all the pages these books have shown. I will call attention to the pages on which he made his entries, and make the claim that there are no other pages on which he made such entries.

377 (C. G. AUSTIN:) The whole book is offered for the purpose of showing there are no other entries except those.

(AMEY:) Well, that would be all right if you call attention to the pages that he wishes to use.

(W. AUSTIN:) I can't do it at this moment.

(COURT:) Well, then, when you indicate it, we will pass upon it, and have it received in connection with his evidence.

(W. AUSTIN:) And we offer these pages marked "Plaintiff's Z" and Z-1 to Z-4 inclusive, in connection with his testimony. He used them to refresh his recollection—so much of them as is in his handwriting.

(AMEY:) I would also like to have a chance to look at this book before they go in.

(COURT:) We won't pass upon it until they have indicated what they want received, and then you will have an opportunity to make an examination if you desire.

Redirect examination by Mr. AMEY:

Q. Mr. Austin called your attention to some repairs that were re-

ported on the 5th day of January, 1912. I wish you would find that place for me, I would like to see it. Could you tell me
378 whether the repairs were made on the opposite page?

(W. AUSTIN:) That isn't evidence, there are certain entries in that book that are not authenticated, and until they are we object to his testifying about them.

(AMEY:) That is all right, I will put on another witness, if the court please.

Q. If there had been any torpedoes at Randolph, would you have heard them?

A. Yes, sir.

Q. If there had been any fusees, would you have seen them there?

A. Yes, sir.

(W. AUSTIN:) That has all been over with, this man was only reserved for this purpose.

(AMEY:) I wanted to just ask him one or two questions to prevent recalling him.

C. E. PRESTON, re-called for further cross-examination.

(W. AUSTIN:) I show you pages marked "Z-5, 6, 7 and 8" and ask you if they refresh your recollection?

A. What do you mean, in regard to booking it?

Q. Yes.

A. No, they do not.

Q. Don't refresh your recollection?

A. Not—that is my signature.

379 Q. You recognize the signature?

A. Yes, sir.

Q. That is yours?

A. That is my signature, both of those.

Q. And here is one over here on "Z-8," do you know who wrote that?

A. No, sir.

Q. That is your name, isn't it?

A. Yes, sir.

Q. And did you authorize your fireman to make that booking for you?

A. No, well, I can tell you how sometimes it comes about.

Q. I wish you would.

A. Well, now, sometimes when I have been coming in, sometimes the fireman if he was booking in, would book it up, but I don't remember of ever having a fireman of that signature, that is, of that handwriting. Sometimes this book is held by what we call the boss-fitter, has charge of the work in the engine house, copying work off this book; why, when I have just wanted little things like that, I have sometimes had him and he has booked it and signed my name to it and that might be the case.

Q. Did you run that engine on the 21st day of December?

A. I should say I did.

Q. Do you think you had him book that entry?
A. I possibly might.
Q. And these other entries except the one signed "Hebard" were they booked for you or did you book them yourself.
380 A. That is my writing (referring to Z-7).
Q. How about Z-5?
A. That is my writing.
Q. Now, look at Z-6 whose writing is that?
A. I don't know.
Q. Do you know an engineer by the name of Hebard?
A. Yes, sir.
Q. Is he working for the road now?
A. Yes, sir.
Q. Do you know where he is?
A. Why, I suppose he is in St. Albans when he isn't on the road.
Q. I don't suppose you booked anything there that wasn't necessary, did you?
A. I never advertise to.
Q. And, if you booked that to "pack the right valve stem," it was because the right valve stem was leaking?
A. Yes, sir.
Q. And if you booked to "pack under stem joint," it was because it needed it?
A. Yes, sir.

(W. AUSTIN:) We offer these in connection with his testimony.

Q. Is a by-pass the same as an over-pass?
A. Yes, sir.
Q. And when you say "right front, fix front by-pass head so it won't leak," you mean so it won't leak steam?
A. Yes, sir.
Q. And when you say "flues are leaking," you mean they are leaking steam, do you?
A. You hardly ever discover them leaking steam, it is always water, unless one should burst or something, and come out
381 with such a velocity that it would bring the steam with it.

(AMEY:) Is this offered as impeaching testimony?
(W. AUSTIN:) Oh, no.
(AMEY:) In connection with his cross-examination, to test the accuracy of his statement?
(W. AUSTIN:) No, it is offered to show the fact, and if they claim that it is out of order, we will defer the offer until it comes to rebuttal.
(AMEY:) We don't think it would be proper rebuttal.
(W. AUSTIN:) They asked Mr. Preston questions about his using this engine. He testified that he used it in November and December right after it had come out of the shop for repairs, and it was in good repair and a good engine, and we think it is proper cross-examination of him to show what repairs — booked.
(AMEY:) There isn't anything in those repairs to indicate that it wasn't a good engine.

(W. AUSTIN:) We don't claim that it wasn't a good engine.
(AMEY:) I don't see the purpose of introducing it.
(W. AUSTIN:) Well, on December 21, it appears that the right valve stem was leaking.
(AMEY:) Hold on, I think if any testimony is put in,
382 it should come from the witness or from the book.
(W. AUSTIN:) Well, he testified to that.
(AMEY:) He hasn't testified about the leaking, has he?
(W. AUSTIN:) Yes, he has.
(AMEY:) That is entirely immaterial, it doesn't tend to show that the engine wasn't a good engine, it doesn't tend to show anything about its condition on the night of this accident and I just want to record those objections to the testimony.
(COURT:) Well, what you offer to show is that it was leaking steam on the 21st of December.
(W. AUSTIN:) The 21st, and that he booked it, so notified them of it.
(AMEY:) The 21st of December?
(W. AUSTIN:) 21st of December, and that it was also leaking steam from this over-pass on the 18th of December. In other words, these engineers both of them have testified that when the engine was out of repair that they booked it, and they relied on these books to fix their memory about it, and in cross-examination I have referred to these books because they have referred
383 me to them.
(COURT:) Well, as independent proof, I don't know, Mr. Austin. You might get the testimony from these witnesses and have them testify from their memory, refreshed by that data.
(W. AUSTIN:) I will not take any chances, Your Honor, if you have that view of it, I will waive the question.
(COURT:) That is the view I have, and I shouldn't want to receive it as independent proof, but I will give you an exception.
Exception by plaintiff.
(AMEY:) I want an exception to the making of the offer, because it has all gone to the jury from Mr. Austin.
(COURT:) You may have it, you may have an exception.
Exception by defendant.
(AMEY:)I don't because I want to apologize for the engine, I don't desire to do it, but because it is weaving in to this case an extraneous matter that has no business in.
(C. G. AUSTIN:) Well, now, that isn't correct.
(COURT:) Well, we have decided the question, we won't take up any more time with discussion. We have given you an exception.
We haven't excluded them in connection with the witness'
384 testimony, but we have excluded them as independent proof, and given you an exception.

Q. Well, now, having looked at the book, Charlie, will you tell us whether the engine was in fact and truth leaking from the right valve stem on the 21st of December, when you came in?

(AMEY:) I object to that, incompetent and immaterial.

(COURT:) Well, we will receive it and overrule the objection. Exception by defendant.

A. It certainly was, or I shouldn't have booked it.

Q. And on the 18th of December, was she leaking from that front by-pass head?

(AMEY:) Same objection, incompetent, irrelevant and immaterial.

(COURT:) The same objection and exception, and for all these questions of similar character, an exception is noted for the defendant.

Exception by defendant.

A. I don't think that was opposite my signature, was it?

Q. Yes.

A. Yes, sir.

Q. She was?

A. She must have been, or I shouldn't have booked it.

385 Mr. STORMS, recalled.

Direct examination by Mr. AMEY:

Q. Mr. Storms, as despatcher, do you keep the records of the movement of trains on the road?

A. Yes, sir.

Q. And between what points?

A. Between all points. Windsor and St. Albans.

Q. And were those records kept in January, 1912?

A. Yes, sir.

Q. I wish you would tell me from your records the number of cars southbound for the month of January, 1912?

(C. G. AUSTIN:) We object to that, the number of cars southbound on this road during the month of January. You mean by southbound between here and White River Junction?

(AMEY:) Between here and White River Junction, yes.

Q. Between St. Albans and White River Junction, the number of cars southbound?

(Objected to, discussion, notes page 39 & 40.)

A. That is going to take some little time, they have got to be booked off from every sheet separate, if I had known that, I could have had that ready.

(AMEY:) I will waive that question.

Q. I want you to tell me the number of south-bound freight and passenger trains combined, the average number daily for
386 the month of January, 1912?

A. Well, that will also have to be booked off, it will take a few minutes.

(AMEY:) What I want is that information. You can go back and hunt it up and I will have you testify later.

SAMUEL R. KRAMER, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. What is your present business?
A. I am assistant superintendent of the Rutland Railroad.
Q. Where do you reside?
A. Rutland, Vermont.
Q. How long have you been in the railroad service?
A. About thirty-five years.
Q. Where did you first enter the railroad service?
A. Well, at Zeno, Ohio, I can't recall the year, as a telegraph operator.
Q. How long were you employed there?
A. Well, a very short time.
Q. With what road?
A. Pennsylvania, it is now the Pennsylvania, it wasn't at the time.
Q. Then where did you go?
A. To the Big Four Railroad, as a telegraph operator.
Q. How long did you remain there?
A. Oh, about twelve years, I should say.
387 Q. Then where did you go?
A. I went from the Big Four to the Nickle Plate Railroad.
Q. In what capacity?
A. General Yardmaster.
Q. How long did you work in that capacity for the Nickel Plate?
A. About three years, if I recall it.
Q. And after ceasing employment there, where were you next employed?
A. On the Lake Erie & Western Railroad as Trainmaster and Superintendent.
Q. How long were you in service for the Lake Erie & Western?
A. About seven or eight years.
Q. After ceasing your emplyoment there, where were you next employed?
A. On the St. Louis & Southwestern, General Yardmaster at Pine Bluff, Ark.
Q. For how long a time did you work there in that capacity?
A. But a few months.
Q. And where were you next employed in the railroad service, Mr. Kramer?
A. As Trainmaster on the Missouri Pacific, Iron Mountain Division.
Q. How long ago was that?
A. About eleven years ago.
Q. Where were you next employed in the railroad service?
A. For the Rutland Railroad.
Q. How long did you work for the Missouri Pacific?
A. Oh, about six months.
388 Q. And then you came to Rutland?
A. Yes, sir.

Q. Have you since been with the Rutland?

A. I have since been with the Rutland, since 1902, as I recall it.

Q. Have you worked in your present employment all the time for the Rutland?

A. I was Trainmaster at first and have since been made Assistant Superintendent.

Q. In your railroad experience, Mr. Kramer. have you had occasion to learn about the Standard Rules?

A. Yes, sir.

Q. What is the origin of the Standard Rules?

A. Well, it is quite a long story to tell just what the origin of them are, but along in the '80's, you see, there were a number of roads which had different books of rules, and of course in connecting lines, there was more or less interchange between the lines, that is, one road's employees would be required to go onto the other road's territory, etc., and it became apparent that it was advisable to have a standard rule, as I understand it, and the American Railway Association according to their records, took this matter up with a view to establishing standard rules for all roads, and try to get them to agree to adopt them. These rules were from time to time—were made up in the first place and from time to time corrected
389 afterward, that is, questions would come up during one year, and the next year the Committee from the American Railway Association would correct something that somebody found out that wasn't exactly right, that they would want to make a little change in it, so it has in that way come up to the present Standard Rules. Those are made by the Committees appointed by the American Railway Association, and consisting of some of the brightest railroad men in the country.

Q. Have you seen Rule 99 in the Rule Book of the Central Vermont Railway Company?

A. Well, I have seen it, yes, but I haven't familiarized myself thoroughly with it, possibly.

Q. Do you know if that is a standard rule?

A. Yes, sir.

Q. How universally are these standard rules used throughout the country?

A. I don't know of a road of any size that does not use the Standard Rules.

Q. And are these Standard Rules adopted for safety?

A. They are thought to be the safest rules that can be made.

Q. And are they adopted as such or are they not adopted as such by conventions of railroad experts?

A. Yes, sir.

Q. You have the Standard Rules on the Rutland Railroad, as I understand it?

A. Yes, sir.

390 Q. And from your observation and experience, is it a practical thing to attempt to notify along at stations following trains of the location of preceding trains on the road?

A. We have considered it poor practice to do that.

Q. And why?

A. Because it makes a divided responsibility, divides the responsibility.

Q. And does it have a tendency to interfere with the vigilance or care of a flagman?

A. It certainly does, yes.

Q. Is it possible, in the practical operation of a railroad, to advise one train of the location of other trains on the road, and vice versa?

A. It is not a practical proposition to put them in force as a rule.

Q. I am going to ask you this same question that I asked Mr. Maun. Two extra freight trains left White River Junction coming north on the main line of the Central Vermont Railway on the 11th day of January, 1912; assume that 401, the forward train, left White River Junction at six o'clock; assume that 708, the rear train, left White River Junction at 10.12 o'clock; that would be four hours and twelve minutes apart. Assume that 401 was delayed on the road between White River Junction and Bethel at West Hartford for a space of in the vicinity of half an hour; assume
391 that it arrived at South Royalton, that is, coming this way, at 9.20 and left at 11.00 in the afternoon; assume that 401 stopped at Bethel, arrived at Bethel at 11.52 and left Bethel at 12.15; arrived at Randolph at 12.50, and departed from Randolph at 12.54 on the morning of Jan. 12; assume that from Randolph to the place of accident, 401 made an average speed of from eight to ten miles per hour; assume further that from White River Junction to the place of the accident, the flagman of 401 put out no torpedoes or fusees at any place; and did not put our any torpedoes or fusees at Randolph. Assume that 708 arrived at Bethel at 12.30 and departed from Bethel at 12.36, arrived at Randolph at 1.00 o'clock and departed from Randolph at 1.00 o'clock in the morning of January 12, that is the rear train, 708; 401 had been gone six minutes. Assume further that engine 708 was leaking steam to some extent; that at times it blinded the engineer so that he could not see ahead; assume that at a point 1.625 miles, or 1 4/5 miles west of Randolph Depot, 708 ran into the rear of 401, and by the impact killed the plaintiff's intestate; what should have been done to prevent the collision?

A. The rear end of that train should have been protected according to Rule No. 9, by the flagman of such train.

392 Q. Rule 99?

A. Yes.

Q. And how should he have protected the rear of that train, Mr. Kramer?

A. By putting down torpedoes and using fusees according to the rule.

Q. If that train stopped at Randolph four minutes, should or should not the flagman of that train use torpedoes and fusees there?

A. He should.

Q. Assume further, assume what I have already asked you in a previous question, and further that White was directed at Randolph

by his conductor to protect the rear end of his train, should he have put down torpedoes and fusees at Randolph?

A. He should have, but he should have done it without any such instructions. Those instructions were not necessary, as I take it.

Q. And should he have done anything to protect the rear of his train after he moved out of Randolph up toward the scene of the wreck?

A. If he was running at the speed you say that he was running, or assume that he was running, he should have dropped fusees along behind him as he went up out from there.

Q. Assume what I have already stated and further that in addition to that the conductor of 708 received a 19 order and clearance card at Bethel; I will assume further that the clearance card was given there at Bethel in connection with a 19 order; that 401 had been gone 20 minutes at the time 708 came in there and got the clearance card and 19 order, would it alter the case any or
393 relieve the rear flagman of 401 from any responsibility?

A. No, sir, not at all.

Q. Assume what I have already said and assume further that brakeman White a short time prior to the collision, was sitting down in the caboose beside the stove, lighting his pipe,—was he in his proper place?

A. He was not.

Q. Assume what I have already stated, and further that 401 was a compound, low wheel engine and was incapable of making the speed that could be made by 708, which was a high wheel engine, —would that make any difference?

A. Not a particle.

Q. Assume further that flagman White did not know that 708 was following him,—would that make any difference?

A. Not a bit of difference.

Q. Assume what I have already stated in all my previous hypothetical questions, and further that flagman White had worked for the company during the last engagement since December 9th, 1911, and knew that trains were frequently running over the road in both directions,—would that relieve him from any responsibility?

A. Not at all.

Q. Would his duty be the same?

A. Exactly the same.

Q. Assume further that he was a competent man and understood his business, namely, that of flagman,—did he perform his duty at Randolph?

A. He did not.

Q. Does rule 99 impose upon the rear brakeman, the rear flagman, the absolute duty of protecting the rear of his train?

A. It certainly does, yes, sir.

394 Q. Is there any discretion about it under the rule?

A. He has no discretion in the matter that I can see.

Q. Well, he is governed by the language of the rule, isn't he?

A. By the language of the rule, that is his sole duty you might say.

Q. Is there any rule in the standard rules, Mr. Kramer, anywhere, that obviates the necessity of complying with rule 99?
A. Not that I can recall, no, sir.
Q. That is, I mean to ask you if there is any qualification anywhere that permits a violation of it?
A. No, sir.
Q. Not in the standard rules?
A. Not in the standard rules. Never came to my notice if it is.
Q. I believe the clearance Form-A, you have seen that?
A. Yes, I have seen that.
Q. I would like to have you look at rule 91, if you will, is that the five minutes rule, Mr. Kramer?
A. Yes, sir, it is all right. I understand.
Q. Now, you understand that Ex. A is there?
A. Yes, sir.
Q. Rule A, and you understand what 91 is. I want to ask you, assuming that two trains come into Bethel station, that 401 goes out 23 minutes ahead of 708, 708 being the following train, following 401. At Bethel 708 gets what is called a 19 order and with it a clearance, an order clearance—is it necessary under the standard rules for that clearance to state the time when the preceding
395 train left the station?
A. Not except the preceding train—not unless the preceding train was left within the block limit.
Q. And what is that?
A. Well, according to that rule it is five minutes block. If they have left within that time it would be necessary to do that. If it was a passenger train it would be 20 minutes, as I understand that, a passenger train ahead.

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Q. I show you "Pl'ff's Ex. R". What is that?
A. It is a clearance card.
Q. Is it a combination?
A. It is a combination clearance and block card.
Q. What do you mean by that, Mr. Kramer?
A. I mean that under certain circumstances it is used for clearing for orders and under other circumstances for clearing the block for a train ahead.
Q. If that card was issued to train 708 at Bethel, what would it indicate concerning train ahead?
A. Under the hypothetical question, the circumstances?
Q. Yes?
A. It would indicate that this operator had the flag out for order No. 4, the train order signal out for order No. 4, for this train, for train 708?
Q. And does that indicate, that clearance card, the train ahead?
396 A. No, sir.
Q. If the train ahead had departed more than five minutes

before the issuance of that clearance card to train 708, is the card properly filled out?

A. It is.

Q. That is, should the blanks be left on the card as they now appear?

A. They should.

Q. Why?

A. Because there is no rule requiring that the next train ahead be shown on this card except the time interval has not elapsed for blocking the train.

Q. That is under Rule 91?

A. Rule 91.

Q. If the blank on the card were filled out showing the time of departure of the preceding train, what would that indicate?

A. It would indicate that this train had left the station within the time limit which the operator is required to block.

Q. And that is under Rule 91?

A. Under rule 91.

Q. Under the standard rules if those blanks were filled out what would be the duty of the conductor of 708 concerning the movement of his train?

A. He should wait until the block limit had expired.

Q. Under the standard rules should the clearance card show the time of departure of the preceding train if it had left the station more than five minutes before the issuance of the card?

A. Please repeat that.

397 Q. Under the standard rules should the clearance card show the time of the departure of the preceding train if it had left the station more than five minutes before the issuance of the card?

A. No, sir, it wouldn't be necessary.

Q. Are these standard rules, Mr. Kramer, the most conducive to safety of any rules in use in this country, according to your opinion as an expert, and the opinion of the association that adopted them?

A. They are.

Cross-examination by Mr. WARREN AUSTIN:

Q. Are you a member of that association?

A. No, sir.

Q. Were you present when these rules were discussed and adopted?

A. No, sir.

Q. Then you are guessing when you say it is the opinion of that association, are you not?

A. No, I have read their proceedings and know from that. That is the only——

Q. That is all the information you have about it?

A. Yes, sir.

Q. You never have talked with them or heard their discussion regarding operation of trains on a single track where there is no block, set of block signals used, have you?

A. Well, I have with parties that have been members of it, they were members of it, but not as a committee.

Q. I am talking about the association which you testified about?

A. No, oh, no.

398 Q. And you never have heard discussions of that association with reference to a road that uses sticks and hoops and other methods of advising a following train that a train had preceded, and what that train is and what time it passed a certain station, have you?

A. Have I ever—as I understand you, have I ever heard their discussion?

Q. Yes, sir?

A. I have not, but I have read their proceedings which shows the discussion.

Q. Now, you say that every road of any size uses this set of rules, do you?

A. Yes, sir, 99.

Q. You mean to be understood that all of those rules are used by every road of any size?

A. I mean that the standard rules as adopted by the association, are used by all these roads in the association.

Q. Then you mean by your answer to have me understand, do you, that not all of the rules that are in this "Ex. B" are used by every road of any size?

A. Well, there are some rules that it is discretionary, as between the roads which version or which rule, or part of a rule, that they may adopt. That is the only difference that I know of.

Q. That is the only difference.

A. Yes, that I know of.

Q. Then you want this jury to understand that the Boston & Main- Railroad operates its trains in the same manner as the Central Vermont Railway Company does, do you?

399 *Q.* Well, I do with respect to—I say, that they use the standard rules with possibly some few additional rules of their own that they might possibly get up, think it was better for their particular physical condition.

Q. That is what you say, is it?

A. Yes, sir.

Q. Well, now, do you know by what method the Boston & Maine Railroad Company operate and direct its trains?

A. By the standard rules and block signals.

Q. Block signals?

A. Sure.

Q. The Central Vermont Railway Company doesn't operate trains by block signals, does it?

A. No, that is, as far as I know they don't.

(AMEY:) I object to that and want an exception on the ground that that is immaterial.

(COURT:) Well, that don't make it error to receive it because it i simmaterial. The Court has held quite frequently.

(AMEY:) Incompetent and immaterial.

(COURT:) Well, don't need to be if it is cross-examination. That it is immaterial. The Court has held quite frequently.
Exception by defendant.

Q. Now, can't you think of any road of any size that uses any other method than the block signal, that is really different than the method used by the Central Vermont Railway Com-
400 pany for notifying two trains going in the same direction of their relative positions?

A. Well, I don't know of any road that does that in other manner, except by under the rule 99. Now, of course, they may change the conditions as to when, and when or under what circumstances they may use this clearance or notification.

Q. I am not calling for speculation, nor what they may do, I am asking you for your——

A. I have to explain those things. I can't answer your question.

(AMEY:) I insist the witness have a fair chance. I insist upon his being allowed to explain and trying to complete his answer to the question already put.

(Question and answer read.)

(WITNESS:) I say that the conditions may warrant a change.

Q. The conditions make quite a difference about that matter, don't they?

A. The conditions might warrant that change on some particular road at some particular dangerous point that they want to protect particularly.

Q. Then care, as you understand it as a railroad man, to be exercised by a railroad company, must be commensurate with the known danger, must it not?

A. Well, yes. If there are circumstances that require extra precautions I should say yes. That would depend entirely upon the conditions.

401 Q. Now, then, not speculating about what may be, or is variation from the usual circumstances, but taking your own knowledge, I want to know if you, as a railroad man having passed from company to company all over the United States, if you do not know that there are railroads of any size other than the Central Vermont Railway Company that use a wholly different method than these rules provide for the Central Vermont Railway Company?

A. I do not?

Q. You do not?

A. No, sir.

Q. And you never have known that method whereby the train as it passes a station, hands out a stick and receives a stick on which there is a clearance card showing the time that the train ahead passed that station?

A. That has been used from time immemorial.

Q. Now, then, have you ever known that method whereby a hoop is hung up on a stationary arm so that a train doesn't have to stop in order to get this clearance card, but it does get a clearance

card by reaching out and getting the hoop, that shows when the last train passed that station?

A. I don't know of any road here that is following that out.

Q. You don't know of the method adopted by the Southern Pacific then, do you?

A. No, I don't. Personally I know nothing about it, but as far as catching clearance cards on hoops is concerned and orders, it has been in vogue for years without any rule.

402 Q. Well, now, that was for a purpose, wasn't it?

A. Save delaying the trains.

Q. And that was the only purpose of it?

A. Only purpose I know of.

Q. And the clearance card meant nothing, did it?

A. Well, that depends upon the rule controlling a clearance card. Why, certainly it does, and that is covered by rule 99 or rule 91.

Q. The Central Vermont Railway Company rule 99 differs from that, doesn't it?

A. No, not a particle.

(AMEY:) Rule 91, you mean?

Witness:) 91.

Q. Oh, 91?

A. Why, this 91 calls for a clearance card under certain conditions.

Q. Well, let's see, show me where 91 calls for a clearance card under certain conditions.

A. I may have the number of the train or the rule wrong. "Unless some form of block signal is used, trains in the same direction must be kept at least five minutes apart except in closing up at stations, but a train must not follow a train carrying passengers or operating a snow-plow until the report has been received of their arroval at a station ahead." That means a positive block from station to station. Now the rest of it isn't material till you get to this: "The train order signal will be used by the operator to maintain the intervals required by the rule." Now, your clearance card—goes on to explain how this clearance card should be used—and applying it in connection with rule 91 it requires that that clearance

403 card be issued to a train following another less than five minutes apart, or if that advance train has passengers they must make that space limit a positive block between the two stations and notify the train behind. If this train arrived—well it don't say twenty minutes—it says a positive block, but if there is no telegraph station at the station beyond, they will hold that train twenty minutes. They will give them a clearance card showing the time this train left there and that holds this man for twenty minutes under the rule.

Q. Now point out that.

(AMEY:) That question is answered. I object to pursuing it further.

(COURT:) This is cross-examination.

(WITNESS:) That requires that a clearance card be given in the circumstances—

(W. AUSTIN:) Just a moment, I object to another discussion.
(WITNESS:) Well, I can't answer your question without discussion.
(W. AUSTIN:) Very well.
(WITNESS:) If I am not allowed to explain why I do it, why I can't do it.

Q. Can you use your finger?

(AMEY:) I object to that question, insulting the witness.
(C. G. AUSTIN:) We want an objection to this course of procedure in the presence of the jury, charging us with insulting a witness, and I think it deserves a reprimand from the court.
404 (COURT:) Well, we will allow an exception. You may proceed.
Exception by plaintiff.
(AMEY:) I would like an exception to the remarks of Bro. Austin.
(COURT:) Well. an exception may be noted for both sides.
Exception by defendant.
(Ques. read.)

A. Can I use it? Why, I guess so.
Q. Well, use it on this rule and point out what sentence or sentences say when and under what circumstances a clearance card shall be used?

(AMEY:) Pardon me, I insist upon the witness being allowed to explain.
(COURT:) Oh, no, there is nothing there to explain. He asks him just to point it out.

A. I can't point it out.

(COURT:) That answers the question.

(WITNESS:) There is an answer to your question—without an explanation.
Q. Now I would like to have you use your finger on pages 122 and 123 and point out there anything that limits the use of that clearance card to five minutes.
A. Nothing on the clearance card. It all depends upon rule 91.
Q. Now, as I understand your testimony, you want this jury to understand that the only object of filling out the blanks in a clearance card by the operator and stating in them when
405 the last train passed this station and whether or not it has arrived at the next station, and if so at what time it arrived at the next station, is to show the conductor of the pursuing train that that train passed within five minutes, so that he will maintain a five minute block at that station?
A. Yes, sir.
Q. Is that true?
A. That is exactly it, you have explained it exactly.
Q. Well, now, what is the use of this—"The train order signal will be used by operators to maintain the intervals required by this

rule" and namely, "unless some form of block signal is used trains in the same direction must keep at least five minutes apart."

A. Why, yes, that is all right.

Q. What is the use of it?

A. What is the use of what?

Q. Of this rule 91, if your construction is right?

A. Why, it simply tells the operator that he must block that train five minutes.

Q. Then what is the use of giving a clearance card showing that?

A. Why, to notify the train to that effect in writing.

Q. If the train can't run by a block—and I understand that you have it so, do you not?

A. Yes, sir.

Q. If a train can't possibly run by this block, this order board, and if the operator must maintain it there five minutes in order to maintain that interval provided by rule 91, why the giving of a clearance card showing that information is wholly futile, isn't it?

A. Why is it? You might have orders for him. The
406 conductor may take that for an order board and not a block.

Q. Does it make any difference, whether it is out for orders or not?

A. Why, certainly not.

Q. If the operator is bound by law of the road to keep it out there for five minutes, to maintain that block, and the conductor is bound by the law of the road not to run by it, does he need anything else to keep him there?

Q. Why, sure. If he sees that block when he comes in and don't know whether it is for orders or what it is for, he must get something to indicate what that block is for before he can proceed.

Q. Does it make any difference what it was for? Can he proceed while that block is out?

A. Yes, sir, if he gets a clearance on the block.

Q. He must be told by a written order that he can proceed if that block is out, must he not?

A. That block may be out for a block and it may be out for orders. This block is——

(Witness interrupted by Mr. Austin.)

(COURT:) That question calls for yes or no.

(Ques. read.)

A. No.

Q. Isn't that block a prohibition for a train to move by it?

A. Now, let me ask——

Q. Answer that.

A. It is prohibition if he don't have the information as to what that block was out for, yes.

407 Q. And that has to be in writing?

A. That has to be in writing, but he don't have to have permission to go. You said permission to go.

Q. Now, the operator is prohibited by the law of the road from giving him that written notice and permission to go until five minutes has gone by?

A. Exactly. It isn't permission, however. It shows him why the block is out; if that notice affects him at that point, that clearance shows him that he is affected by that block, he has no right to go.

Q. Now, in those circumstances, it is only when the whole five minutes have gone by that the operator finds it at all necessary under your construction of this rule, to insert in that clearance card what time the last train ahead, what train it was, what time it reached and passed this station and whether it had arrived at the next station, and if not, that it had not, or rather, if it had, at what time it had arrived at the next station—isn't that true?

A. Well, now, that is quite a long question; I really don't understand just what you are driving at, Mr. Austin. I would be glad to give you any information I can.

(W. AUSTIN:) I will waive it.

Q. I am trying to get at your information. You have told this jury repeatedly that the clearance card at a station should not contain the information of the next train ahead, unless that
408 train had left that station within the five minute block. Now, I am asking you, in view of your recent answers to my questions, if you do not want to wholly turn that testimony over?

A. No, sir, not by any means.

Q. And tell the jury on the contrary, that the very reason for that information and the occasion for its use, is when that five minutes block has gone by and is no longer effective.

A. I do certainly not—certainly do not want to make any such a statement.

Q. Well, if the operator can't let a train by within the five minutes, why should he within the five minutes tell the train at his station what the next train ahead is and when it passed?

A. Why should he?

Q. Yes, why should he?

A. Why, because it is simply a matter of information to this man as to what that block, what that clearance card meant, what it was for.

Q. You mean what that block signal is for?

A. What the block signal is for, yes.

Q. Does it make any difference to him, then, except to satisfy his curiosity, why they are holding this block out here five minutes?

A. Why, it might have went by one minute before, two minutes before.

Q. Might have went by?

A. Sure.

Q. Two minutes before the five minutes block was out?

A. Sure.

Q. Without a clearance card?

A. Before the block was out.

Q. Before the block was pulled down?

A. I say that he may have went by within—he may have
409 went by him within that five minutes at some time. I don't mean that he was gone by—and this other train may have

come there. I mean, the following train may have come there before the five minutes had elapsed, that he was to be held there and this would notify him that this train had left at a certain time. Now, I don't see for myself personally, any particular use in it.

Q. No, in your interpretation of the clearance card it is wholly futile?

A. It is, certainly is, as far as that particular five minute block is concerned.

Q. Yes, and under your interpretation of the rule then, there is no necessity whatever for obeying this command, namely, "If the next train ahead has not reached the telegraph office, the words 'not yet' must be written in the blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type."

A. If that is on the positive block that is necessary, but you are talking about a five minute block.

Q. That is what you were talking about, wasn't it?

A. I know it, but you are quoting there a different proposition altogether.

Q. I call for an answer yes or no, and then you may explain it if you desire?

A. I answered that.

410 Q. Well, I repeat the question, Mr. Witness.

A. Oh, you want another answer?

Q. I want an answer.

A. In the case of the five minute block——

(W. AUSTIN:) I think that question should be answered by yes or no.

Ques. read.)

(COURT to the witness:) Now that he asks for you to answer by yes or no, Mr. Witness.

A. Why, it is necessary under the absolute block condition.

Q. Then you mean to go back again to your original position that it is necessary to obey that only while the train is held for that five minute block, do you?

A. Sure, while it is in the block.

Q. Yes, and that is where you want to stand at last is it?

A. Well, now, just wait a minute. You are putting in two different conditions here in one question. Now, the one answer I can't answer it with one answer.

Q. What are the two conditions I have got in my question? If you don't understand it I would like to have it re-read to you?

(Ques. read.)

(COURT to the Witness:) The last part of his question, Mr. Witness, you will notice was the reading of the rule itself, but the question is contained in the early part. that is, the interrogatory is contained in the early part of the question.

411 A. No, sir, not under my ruling. Hold on—wait a minute now, wait a minute—now let me see. You say that

under my ruling—now let me get that answer right. Under my ruling, it is necessary to follow out those instructions when the positive block is in effect.

Q. And only then?

A. Or when the five minute block period has not expired.

Q. And only then?

A. Only then.

Q. And then you come right back, do you, after stating that it is wholly futile within that time?

A. I am talking about the rule as it stands, not my opinion—not me to abrogate anybody's rules.

Q. Then you come right back to the proposition, having said that it was wholly fuyile to do that within the five minutes, yet you say that that is the only meaning of this rule that I have just read?

A. Why, I say that, just as my answer there, as clear as I can make it.

Q. Now, I think you and I understand each other about that.

A. All right.

Q. Now, you say it is poor practice to divide responsibility on a railroad in the operation of trains?

A. Yes, sir, it certainly is.

Q. Would you follow that out to another conclusion and say that it is the best railroading to concentrate responsibility?

A. That would depend largely upon what his responsibility was, whether it was a case where divided responsibility would
412 be better than concentrated responsibility.

Q. Well, the construction or the theory of railroad management ought to operate just as well upon the poor fellow who is dead, killed in a railroad accident, as upon the train despatcher sitting in his office, ought it not?

A. It should, of course, but the conditions under which these men are operating should also be taken into consideration, and each man given the benefit of that circumstance.

Q. It ought to so operate, you say?

A. Well, I don't know that I have got your line of thought, or am thinking along your line of thought.

Q. I am trying to follow your line. You laid out this course for me.

A. Well, all right. I don't believe, as I said, there in my testimony, that it is good railroading to divide responsibility when it can be avoided.

Q. And on the other hand you do believe, do you, that it is better railroading to centralize authority?

A. Well, all you can consistently.

Q. Yes, all you can. Now you have said that it was not possible to advise trains going in the same direction on a single track of their relative position. Do you mean to leave it there?

A. I said it was practically impossible. I didn't say that it wasn't possible. There is nothing but what is possible.

413 Q. No, indeed, it is practically possible, is it not, on the contrary?

A. Practically possible?

Q. Yes.

A. No, sir, it would not be a practical proposition to do it, is what I mean.

Q. No, but you find that when it is made absolutely imperative on you that it is practically possible, don't you?

A. I don't know of any case which I have encountered where it has been made imperative upon me to do that.

Q. Well, when two trains are running on the same track, toward each other, you find it practically possible, don't you?

A. To meet those trains, you mean?

Q. Oh, no.

A. To protect those trains you mean?

Q. No, to give each an order on the other.

A. Why, certainly, that is a part of the despatcher's business.

Q. What makes it more difficult to give two other trains similar orders?

A. There is a great deal of difference, because you cannot tell, you have not the means of ascertaining the whereabouts of trains between stations, that you have of ascertaining the whereabouts of trains which are about to meet. That is, where you are going to meet two trains, you assume that the train or both trains will be at certain points at certain times. Two orders are put out for them to
414 meet at certain points, with the least delay possible. You understand what I mean? Now, there you are not taking any chances or anything, you are not advising anybody about anything, you are taking no chances at all. Now, in the following train, the despatcher is not cognizant of the position of that train after it leaves the station until it absolutely reaches the next station, he don't know anything about it.

Q. Let's take a stretch of track from White River Junction to South Royalton, and assume that there is no operator at West Hartford, and none at Hartford, and none at Sharon; that those offices are closed tight, and that it is in the middle of the night, and that a train has left White River Junction, bound to South Royalton, the operator knows when that train left White River Junction, didn't he?

A. The conductor does as well. Yes, they all know that from the register.

Q. The operator knows it, doesn't he?

A. Yes, sir.

Q. He conveys that information to the train despatcher, doesn't he?

A. Yes, sir.

Q. As I understand you, if that train happens to be going north, if that train happens to be going north, he don't know where it is while it is between those two points?

415 A. No.

Q. No. Well, let's assume that a train starts from South Royalton, there is an operator there—the operator knows when that train leaves, doesn't he?

A. Yes, sir.

Q. Then the despatcher knows when it leaves?

A. Yes, if the operator tells him.

Q. But that train going south, that train going south, the despatcher can follow it all the way down, can he, and know right where it is between those two points?

A. No, he can't.

Q. Then we come down to this proposition, don't we, that it doesn't make any difference whether the train is going north or south, between two stations, the despatcher can't know its exact position, can he?

A. No, he does not, but in giving an order to meet two trains moving one against the other, he doesn't give that man any information wherein there will be any danger of his taking it one way or the other, for instance, if you give a man following another train, the information that he had left there at a certain time, what good is it?

(W. AUSTIN:) Well, I supposed, if the Court please, that I was the questioner.

(WITNESS:) Excuse me for interrogating you, I was just trying to explain it, that is all.

416 (W. AUSTIN:) Well, I'm going to give you all the rope you want.

Q. Now, I want to know if it is possible, if you find in actual practice that it is not only possible but absolutely necessary for you as a railroad company regardless of the fact that you can't know the position, where these trains are, when they are between two telegraph stations, recognizing that you don't know it, yet nevertheless you do find it possible to give them orders on each other, do you not?

A. Yes, and oftentimes have to change them on account of misjudging what their speed was, where they were.

Q. Now, then, does it make any difference whether those two trains are moving north, both moving north, about that?

A. Why, certainly.

Q. It does?

A. Why, certainly.

Q. You couldn't give 401 at White River Junction an order to run from White River Junction to South Royalton, could you?

A. Oh, yes.

Q. Now, you couldn't give 708 an order to run from White River Junction to South Royalton and follow 401, could you?

A. You could do anything you wanted to of that kind.

Q. You could?

A. Sure, why of course, but what good is that?

417 Q. Oh, you will now say that, won't you, when you testified that it was practically impossible to do that?

A. I didn't testify to anything of the kind.

Q. Very good, if you want to take that position, that clears that up.

A. Yes, sir.

Q. Now, let's talk about orders. An extra train has no schedule, has it?

A. No, sir.

Q. Unless its train order, its running order fixes a time when it will wait at certain stations?

A. Yes.

Q. That gives it a schedule?

A. If they make the schedule, they can make an order schedule, if they wish to.

Q. And if they do not so establish a schedule, in the order, then there is no schedule time for that train, is there?

A. Well, I don't know how the rules are on the C. V. Of course, there would be no schedule time, no, no schedule time.

Q. And if an extra freight train, running under orders,—and it must have them, mustn't it?

A. Oh, yes, certainly——

Q. Obeys those orders, it is performing its function, isn't it?

A. Certainly is.

Q. Who is in charge of the extra freight train?

A. The conductor and engineer are jointly responsible for the safety of the train.

Q. Isn't there any one person who is the captain?

418 A. Oh, the captain, Oh, yes, the conductor is the captain of the train, of course, he is the man who is supposed to be the captain.

Q. When it comes to an exercise of judgment as to the management of that train, who is the man who exercises it?

A. As to the management of the train?

Q. Yes.

A. Yes, sir, why, the conductor of course would exercise his judgment as to the management of the train. I don't know as it would be judgment, either, it would simply be follow the rules.

Q. And in following the rules, neither the conductor in the management of the train, nor an expert witness in the trial of a railroad case should put a construction on those rules that will render their performance futile, should he?

A. That is quite a broad question, I don't see how I could—my construction on there would render it futile.

Q. You mean to say you can't answer that?

A. Well, you better read the question over again, possibly I can.

(Question read.)

A. Why, no, certainly not.

Q. And one part of the rule is just as important as another, isn't it?

A. Certainly is.

Q. And if a rule requires the performance of a certain duty

419 by a flagman, and a construction is put upon that rule that renders it impossible for him to perform it, you would say that that construction was faulty, would you?

A. If it was given a construction that was an impossibility for a man to perform, yes, certainly would.

Q. And if such a construction was placed upon a rule regarding the flagging of a rear end of a train that would denude the train

of its train crew, you would say that was a rediculous construction, wouldn't you?

A. Well, I don't know what you mean by denude.

Q. Well, strip, take away.

A. Take away all the men off the train?

Q. Yes.

A. Certainly, it would certainly be absurd.

Q. Well, now, this rule that you have talked so much about, this rule 99 here, involves a condition of affairs where the flagman can be recalled, doesn't it?

A. Yes, sir.

Q. And the next rule after it, Rule 100, requires someone to take his place when he gest off, doesn't it?

A. Yes.

Q. And if that fellow should have to get off, who would take his place?

A. Well, I don't know why any circumstances wherein he would be compelled to get off if he had one man off.

Q. That is it exactly. You wouldn't put any construction
420 on these rules that would result in any such absurdity, would you?

A. No, certainly would not.

(W. AUSTIN:) I want to read that rule 100 in connection with his answer.

Rule 100. "When the flagman goes out to protect the train his place will be filled by the person designated by the conductor."

Redirect examination by Mr. AMEY:

Q. Now, Rule 100, Mr. Kramer, he has just read to you, which is, "When the flagman goes out to protect the train, his place will be filled by the person designated by the conductor," now, in your experience as an operator, does it frequently occur that you have to send the flagman back?

A. Oh, yes.

Q. And does it frequently occur that the flagman has to come along on the next train?

A. It certainly does, quite often.

Q. And does that operate to denude the trains of their crew?

A. No, it does not.

Q. You may explain why?

A. Because you have two men left on your train, sometimes three, according to the size of the crew.

Q. And the trains, the extra trains, don't they have a right to take a siding and allow another extra to pass, is that true?

A. Yes, sir.

421 (Objected to, discussion. Objection withdrawn.)
(Question read.)

A. Yes.

Q. Does Rule 99 leave the flagman in absolute charge of the flagging?

A. It does.

Q. And on the Rutland Road, I believe you said you were operating under the Standard Rules, do you require a five minute space?

A. We require five minute spacing between freight trains, and ten minutes following a passenger train.

Q. And are you familiar, Mr. Kramer, with the traffic on the Central Vermont, the amount of traffic?

A. Well, only the information I have gotten from since I have been here in talking with the men, etc. I should say——

Q. Have you been on the Central Vermont, been up and down the Central Vermont more or less?

A. I have been over here a number of times, yes, seen their time-card.

Q. And does Rule 99 give the flagman any discretion as to when he shall flag or when he sha'n't flag a train?

A. No, I think it is imperative that he should flag under the conditions stated in the rule.

Recross-examination by Mr. W. AUSTIN:

422 Q. Well, then, if he is the boss of that job, he is the man who must know and appreciate those circumstances before he shall say that it is necessary to get off and flag, mustn't he?

A. He has no discretion in the matter, whatever.

Q. Isn't he supposed to use his brains?

A. Supposed to use common, ordinary horse sense, would tell a man when a train stops or when it has been delayed.

Q. I object to his evading my question, you can answer some of these questions by yes or no.

A. Well, all right, I am willing to do it, I would be glad to do it. (Question read.) A. He certainly is.

Q. You can't answer by yes or no, can you?

A. Yes.

Q. Well, he must use those brains when he is performing this function, you say, of bossing that job, mustn't he?

A. Yes.

Q. He is the sole judge in your testimony of whether the occasion has arrived when he should get off and flag, is he?

A. I don't think he is the sole judge, it isn't a question of judgment, it is a question of duty, a question of common—or a question of, well, a question of obeying the rules, not a question of judgment.

423 There is a rule that tells him under what circumstances he shall flag. Now, anybody knows that when a train stops—and he knows when it is being delayed. Now, it is simple enough, there is no judgment to be used that I can see.

Q. No.

A. Don't require very much judgment in that kind of a situation.

Q. It requires a——

A. A man of ordinary, common ability.

Q. It requires the sense of perception, doesn't it?

A. Certainly does.

Q. And it requires some knowledge, doesn't it?
A. Yes.
Q. And one of the things he is to know is that his train is delayed, isn't it?
A. Sure.
Q. And he is to know if it is stopped, isn't he?
A. Yes.
Q. And he is to know if it — likely to be overtaken by a pursuing train, isn't he?
A. Well, he doesn't have to know that.
Q. Oh, he doesn't?
A. That, he don't have to know it, positively, he must assume that at any time.
Q. He must assume that, he don't need to know that?
A. He don't need to know it because he knows without any specific knowledge of the fact that that thing is liable to occur any moment.
Q. Then you would have us understand that that clause of that rule is wholly futile?
A. No, sir, not by any means.
Q. Well, sir, if it means anything, what does it mean?
424 A. Means just exactly what it says.
Q. Well, now, then, he must know that that thing that it says, exists, mustn't he?
A. What is that?
Q. That he is liable to be overtaken by a pursuing train?
A. Well, he does know that, anybody known that.
Q. And he is the man who is supposed to know that, isn't he, under your interpretation?
A. He is supposed to.
(COURT:) Answer that by yes or no.
A. Why, sure, yes.

425 C. M. BROOKS, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. Were you the operator at Randolph on the night of Jan. 11, and the morning of January 12, 1912?
A. I was.
Q. Were you there when 708 and 401, trains going north, passed the station?
A. I was.
Q. You may tell the jury if 401 was on the main line?
A. Yes, sir.
Q. And did it remain on the main line?
A. Yes, sir.
Q. And left on the main line?
A. Yes, sir.

Cross-examination by C. G. AUSTIN:

(Counsel at the benach.)

(AMEY:) I think in view of the way I have been held down with these witnesses, that this examiner should not be allowed to go outside of the scope of my questions in direct, in cross-examination.

(COURT:) Well, I can't pass upon anything until it is raised.

(AMEY:) That is what he evidently intends to do.

Q. Mr. Brooks, how near is the main line or track to your station at Randolph?

A. Probably 8 feet, probably the nearest rail is 8 ft. from the office.

Q. Simply a platform between your office and the main line?

A. Yes, sir.

Q. And you are the night operator there?

A. I was, yes, sir.

426 Q. And have been how long? How long have you been night operator?

A. Two years.

Q. And how far visible is the main line that you speak of south from your office?

A. I should say——

(AMEY:) Object to that on the ground that is isn't cross-examination.

(Discussion, question excluded.)

Exception by plaintiff.

Q. Now, where were you at the time of the arrival of those *tow* trains?

A. In the office.

Q. And I suppose your office is arranged like the ordinary offices of the road, is it not?

A. I think so.

Q. With a window in front?

A. Yes, sir.

Q. A window to the left so that you may see down the track?

A. Yes, sir.

Q. And a window to the north so that you may see up the track?

A. Yes, sir.

Q. And your office at that time was provided with telegraph and telephone connections between that and the despatcher's office, was it not?

(AMEY:) Object to that on the ground that it isn't cross-examination.

(COURT:) We hardly see how it is cross-examination.

427 (AUSTIN:) I waive the question.

(AMEY:) I want an exception to the asking of it.

(COURT:) Well, if that is exceptionable, you may have it.

Q. When 401 arrived at your station, where did she stop?

A. The rear end was somewhere near the station.

Q. Then the train, the main train had passed the station, had it not?

A. Yes, sir.

Q. And when you came out, could you see the rear of the train, of 401?

A. I am not positive of that, I don't remember much whether I could or not, didn't take any notice.

Q. Did not the tail lights of the caboose or the hind-car of 401, when you came out of your office, set right in front of your window?

A. Might have.

Q. Well, don't you know?

A. I am not positive now.

Q. You testified before the Service Commission, did you not, when this matter was heard before them?

A. I was there, yes, sir.

Q. Well, the question is, did you testify?

A. Yes, sir.

Q. Did you so testify before the commission that they did?

A. I am not positive of that.

Q. Well, do you know whether you did or not?

A. No, I don't.

428 Q. Well, now, did you notice the tail lights of the hind end of 401?

A. When they were going I did.

Q. Well, as they stood there in front of the station?

A. Not that I remember.

Q. Were those tail lights properly displayed?

(AMEY:) I object to that on the ground that you haven't qualified him.

Q. Well, what tail lights did you see?

A. See the rear end lights as they were going along, when they were going.

Q. Well, what were those lights?

—. Red lights.

Q. And was there a lantern on a chain besides those?

A. I couldn't say as to that.

Q. Now, where did you first see 708?

(AMEY:) Object to that because it is not cross-examination.

(COURT:) Well, I think that that is, we could hardly exclude that as not Cross-examination. We allow that question and answer, we hold that that question is admissible.

(AUSTIN:) On consultation with my associate, we prefer to withdraw that question than to have the objection stand.

(COURT:) Very well.

429 (AMEY:) I want an exception to the asking of it. That is ruled upon in Clark against the Employers' Liability Company.

(COURT:) Well you may have an exception if it is allowable.

Exception by defendant.

(COURT:) The case you refer to was where *that* it was not in good faith, where the inquiry, the Court found, as I remember the case, that it wasn't made in good faith, the question wasn't asked in good *good* faith.

(AMEY:) Well, my recollection is different, I am probably mistaken about it.

(COURT:) Well, we will adhere to this class of ruling until the authorities have shown that we are wrong.

(AUSTIN:) Well, in view of thee safe way to get along, we will ask no further questions.

430 Mr. STORMS, recalled by Mr. Amey.

Q. Mr. Storms, I believe you have stated, that you were one of the despatchers for the Central Vermont Railway in January, 1912?

A. Yes, sir.

Q. And that you held that position for some time previous to that?

A. Yes, sir.

Q. And that you have been a despatcher ever since?

A. Yes, sir.

Q. And as the despatcher in your office, you keep records of the number of trains moving?

A. Yes, sir.

Q. Do you keep records of the number of cars moving each day?

(COURT:) Hasn't he testified to all that?

(AMEY:) I am simply qualifying him, if he has testified to it, I will withdraw the question.

(COURT:) He has testified to all that, it was left as I remember it, for him to ascertain the number of trains.

Q. Have you examined your records for the purpose of ascertaining the number of cars and the number of trains moving to and from White River Junction in January, 1912?

A. I have.

Q. You may tell me, for the month of January, 1912, the number of south-bound cars from St. Albans to White River Junction?

A. There was 9,402.

Q. And on the average how many cars per train?

431 A. Oh, I should say 23 to 25.

Q. During the month of January, 1912, how many north bound cars?

A. Well, there was 7,905.

Q. How many cars per train, on an average?

A. Well, the north bound trains will run from 25 to 40, depends upon the loads, of course.

Q. Now, during the month of January, 1912, how many through trains did you handle, south bound from St. Albans to White River Junction?

A. 338.

Q. How many of those were passenger trains?

A. In addition to that 338, there were 148 passenger trains.

Q. How many north-bound?

A. 362 freight trains, and 152 passenger trains.
Q. And is that, Mr. Storms, the average traffic on the road, should you say, from month to month?
A. Yes, sir.

432 ANDREW B. MCCARTHY, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. What is your business?
A. Railroad trainmaster.
Q. In what road, in the employ of what road, are you?
A. Grand Trunk Railway.
Q. How long have you been in the employ of the Grand Trunk?
A. About 11 years.
Q. In what capacities have you served during that time?
A. Yardman, Yard Foreman, Yardmaster, Telegraph Operator, Train despatcher, Brakeman and Railroad Conductor.
Q. Have you been an instructor of rules?
A. I have.
Q. How long have you been an instructor in the rules?
A. About six months.
Q. Is the Grand Trunk Railway operated under the Standard Rules?
A. They are.
Q. And are they the same as you have on the Central Vermont?
A. Identically the same.
Q. Prior to your working for the Grand Trunk, where were you employed?
A. Montreal, and afterwards at Island Pond and back to Montreal.
Q. Have you ever been employed by any other railroad?
A. I have.
Q. What other railroad?
A. Canada Atlantic, Canadian Pacific, New York Central, Colorado Springs & Cripple Creek District Railroad, Midland Terminal Railroad, New York Central and Grank Trunk.
433 Q. Are those railroads operated under Standard Rules?
A. At the present time they all are.
Q. Now, How extensively are the Standard Rules used?
A. They are used by all railroads, with the single exception of the Intercolonial, as far as I know.
Q. That is do you mean in America?
A. United States and Canada.
Q. Is the Intercolonial a Government road?
A. It is.
Q. Has the Canadian Government required the use of Standard Rules?
A. No, the Canadian Government has as far as all railroads in Canada under federal charges.
Q. Under Federal charges, what do you mean by that?

A. Well, the same as charter issued by the United States Government, by a charter issued by the Dominion of Canada.

(W. AUSTIN:) Is this man a lawyer as well as an expert on railroading?

(AMEY:) No, I don't claim that.

(W. AUSTIN:) Well, then, I guess we better move to have it stricken out with reference about the law of Canada.

(AMEY:) Well, he is testifying of the fact now, not to any law.

(COURT:) Well, that fact, the law of Canada is a fact, in our Court, you know. That may stand, proceed.

434 Q. Why isn't the Intercolonial operated under the Standard Rules?

A. It is supposed to be owned and operated by the Government of Canada and do not, does not come into the Railroad Commission.

Q. Do you know how the Standard Rules were established?

A. Yes.

(COURT:) Does that make any odds, Mr. Amey? Is there any other purpose than the purpose of showing that they are in general use, coming under the general holding of our Court, that the action of a railroad in accordance with conduct of other roads, using the same appliances or the same rules, are evidence that the use of those rules are not negligence. Do*u* you offer that for any other purpose?

(AMEY:) Well, I want to show, as I have shown by the other witness, the fact that these rules have been established after convention and deliberation and the sanction of the best railroad experts in the Country.

(COURT:) Well, will that carry it any farther? We shall hold anyway as we have indicated. Now, that was as far, I think as the law holds on that point, and that is as far as it would be of benefit to you, I think. If you have no other purpose than that,
435 need you waste much time on that point? that is what we shall hold, as we held in the other case.

(AMEY:) I won't insist upon that.

(COURT:) Very well, I only make this suggestion that if you can save time perhaps by it.

Q. Have you in mind Rule 99, Mr. McCarthy?

A. I have.

Q. You may tell the jury whether Rule 99 places upon the flagman the absolute duty of protecting the rear of his train?

A. It certainly does.

Q. And is it safer to require that than it is to require the station agents along the road to notify each train of the location of the other?

A. Decidedly so.

Q. And why is that, Mr. McCarthy?

A. For the simple reason that the flagman on the rear of the train knows at all times the conditions surrounding his train and if

necessary, he must take the necessary steps for to protect the rear of his train.

Q. You have heard the testimony this morning in regard to the amount of traffic on the Central Vermont?

A. Yes, sir.

Q. And in a situation of that sort, is an extra liable to be overtaken by a train at any time?

A. Yes, sir.

Q. Is it possible, Mr. McCarthy, in the operation of a road as the Central Vermont is operated to tell one train of the location
436 of another when they are going in the same direction?

A. Practically impossible.

Q. And why is that?

A. For the simple reason that the train despatcher on duty does not know the exact position of trains moving in the same direction, in regard to one train ahead of the other at all times.

Q. Well, Mr. McCarthy, does that depend upon the speed?

A. Not necessarily.

Q. And does it depend—do you know—is there any way of knowing what may happen to a train between stations?

A. No, sir.

Q. I am going to ask you a long question, Mr. McCarthy. Two extra freight trains leave White River Junction coming north on the main line of the Central Vermont Railway on the 11th day of January, 1912; assume that 401 is the first train to leave White River Junction, coming north, and that it left at six o'clock in the evening, and 708, the following train, left at 10.12 o'clock in the evening; assume that 401 was delayed on the road between White River Junction, at West Hartford; that it arrived at South Royalton, a station this side of West Hartford, at 9.20 and left at 11.00 P. M.; assume that 401 stopped at Bethel, arriving there at 11.52, and leaving at 12.15; arrived at Randolph at 12.50 and left at
437 12.54, on the morning of the 12th; assume that from Randolph to the place of the accident, 401 made an average speed of from 8 to 10 miles per hour; assume further that from White River Junction to the place of accident, the flagman put out no torpedoes or fusees at any place; assume that 708 arrived at Bethel at 12.30 and departed from Bethel at 12.36; arrived at Randolph at 1 O'clock, and departed at 1 o'clock, not stopping there; assume further that the engine of 708 was leaking steam so that at times it blinded the engineer, so that he could not see ahead; assume that at a point 1.625 miles, or 1 4/5 miles west of Randolph depot 708 ran into the rear end of 401, and by the impact killed the plaintiff's intestate; now what should he have done to prevent the collision?

A. The 401 should have had the necessary protection on the rear.

Q. Assume that, instead of assuming that there was no protection from South Royalton, from White River Junction to Randolph, assume that no torpedoes or fusees or protection was used at Randolph by the rear flagman, what should the rear flagman have done at Randolph that he did not do?

A. He should have protected the rear of his train.

Q. By what means?

A. By the use of flag signals or torpedoes, fusees and red and white lanterns, if necessary.

438 Q. Assume further that Mr. White was directed at Randolph by his conductor to protect the rear of his train, what should he have done there?

A. He should have complied with the rules, Rule 99.

Q. Assume further, in addition to what I have already stated, that the conductor of 708 received a 19 order and clearance card at Bethel; that the clearance card read as follows: "Central Vermont Railway Company. Clearance. Bethel 1/12/12. Train 708. I have orders 4. The next train ahead is —. It left this station at — and arrived at —. Signal displayed for orders, and does not now affect you. Sherlock, Operator." Assume that that clearance was given to 708,—was it still the duty of the flagman to put out torpedoes and fusees at Randolph?

A. It was.

Q. Assume what I have already told you, and further that 401, at the time of this clearance card, had left Bethel from 20 to 23 minutes before 708 came along. Was it still the duty of the rear flagman to do what you have suggested?

A. Yes, Sir.

Q. Assume further, in addition to what I have already stated, including what I have asked you in previous questions, that a short time prior to the accident, flagman White was in the ca-

439 boose, sitting down lighting his pipe, was he in his proper place?

A. No, sir.

Q. Where should he have been? Excuse me half a minute until I find out—how fast was that train going?

Q. Eight to ten miles an hour.

A. He should have been back flagging the prescribed distance from the rear of his train.

Q. Assume in this question everything that I have asked you previously in my hypothetical question, and in addition that 401 was a compound, low-wheel engine, and impossible of making the speed that could be made by 708, which was a high-wheel engine. Would that alter the duties that you have stated that Mr. White should have performed?

A. Not in the least.

Q. Assume everything that I have asked you in the previous hypothetical questions, and further that Flagman White didn't know that 708 was coming, was it still his duty to do what you have stated?

A. Decidedly so.

Q. Assume what I have already stated in the previous questions, and further that Flagman White had worked for the company during his last engagement since December 9, 1911, as a Flagman on a freight train, and knew that trains were frequently running over the road in both directions. Whether it would have been his

duty, still his duty to have done what you have stated he should have done at Randolph?

A. It certainly was.

440 Q. And to have protected the rear of his train, as you said he should have, in going from Randolph to the scene of the accident?

A. It certainly was.

Q. Assume what I have already stated in the previous questions, and further that he was a competent man and understood his business, namely, that of a flagman, was Flagman White—what should Flagman White have done that he did not do?

A. He should have been in a proper position to protect the rear of his train, and failing to do so, was guilty of criminal negligence, in my opinion.

Q. Assuming what I have already stated, whether or not he should have put out torpedoes and fusees at Randolph?

A. He certainly should.

Q. Whether or not he should have put out torpedoes and fusees between Randolph and the place of the accident?

A. He should have dropped fusees, if his train was moving.

Q. You mean between Randolph and the place of the accident?

A. Yes sir.

Cross-examination by Mr. W. AUSTIN:

Q. Your idea, from what Brother Amey has assumed in his questions, is that there was criminal negligence here on the part of somebody, is it?

A. As far as I understand the case, yes.

441 Q. And the person or corporation who was to blame for that negligence in your opinion was guilty of criminal negligence, was it?

(AMEY:) Now, wait, I object, because what he said, he said with reference to the rear flagman.

(COURT:) Well, we will receive an answer to the question, and an exception may be noted.

Exception by defendant.

(Question read.)

A. Am I to answer the question?

(W. AUSTIN:) Mr. Amey doesn't have anything to say whether you are to answer that or not.

(WITNESS:) Am I to answer that question?

(COURT:) The Court has ruled that you should answer the question.

A. Yes sir.

Q. Now, then, I assume that you have made all your answers based upon these facts stated by Brother Amey in his questions, haven't you?

A. So far as I know, yes.

Q. You haven't gone beyond the question and taken into consideration anything else except what he has given to you in asking them?

A. Well, I have answered his questions on my practical knowledge as a railroad man.

Q. That isn't what I asked you.

(Question read.)

A. No.

Q. And he gave you as one of the bases for your opinion
442 that this train was running at an average rate of from eight to ten miles an hour, you recollect that, do you?

(AMEY:) That was between Randolph and the place of the accident.

(W. AUSTIN:) That is what we are talking about.

Q. Between Randolph and the place of the accident?

A. Yes.

Q. Let's assume that that train ran only a mile and four-fifths, and that it started from a stand-still, Are you able to say at what rate of speed it was going when it stopped or when it reached the end of the mile and four-fifths?

A. No, sir.

Q. Well. whatever that rate of speed was, is it safe to say that it had attained its highest rate of speed at the end of the mile and four-fifths?

A. That depends on the physical characteristics of the railroad, that depends upon the condition of the railroad at that point.

Q. Let's assume that it is a gradual grade, gradual grade continuing from Randolph to the scene of the accident, the distance being a mile and four-fifths, isn't it safe to assume that at the end of this mile and four-fifths, it had attained its highest rate of speed?

443 A. No, sir.

Q. Where did it have its highest rate of speed between the place where it began and the end of the mile and three-fourths?

A. Well, from the time it left Randolph to the time of the accident, if the engine was working properly, hadn't lost any momentum during the voyage, it should have been going at its maximum speed between those two points at the point of the accident.

Q. Well, can you say where between those two points?

A. Randolph and the scene of the accident. If the engine hadn't slipped or had no trouble between Randolph and the point of the accident, it should have been going its maximum speed between those two points at the moment of the accident.

Q. That is just exactly what I asked you. Then you can also assume that as you go back from the scene of the accident, down to Randolph, you have to diminish the scale of speed?

A. Yes, sir, providing as I said.

Q. Yes, providing all those things. Now, this rear brakeman ought not to have embarked, if that is the case, on the train, had he?

A. Not necessarily embarked, Mr. Austin.

Q. And if he ought to have got off up there at the scene
444 of the accident, isn't it much more important that he should have got off way back down there near Randolph?

A. I don't understand that question.

Q. Well, if we adopt your interpretation of that rule, then, this rear flagman should have walked behind his train, carrying a flag, shouldn't he?

A. No, sir, I didn't say anything of the kind.

Q. And the conductor should designate some man to take his place, shouldn't he?

A. There was no occasion for the conductor designating, the flagman was on the train.

Q. Let's stick to the question. If this man had got off the train or had not embarked on it and was walking behind the train with a flag, the conductor should designate some man to take his place, shouldn't he?

A. Not necessarily.

Q. Well, don't you give any force to Rule 100?

A. Yes, take 100 into consideration.

Q. Well, let's see, maybe I have forgotten the rule. "When the flagman goes out to protect the train his place will be filled by the person designated by the conductor." Don't you give that rule any importance?

A. Yes, sir.

Q. Well, now, then, assume that this train continues along, continues to accelerate its speed, but by some reason it is de-
445 layed again, and slows down to ten miles an hour. Now, then, what should happen?

A. Depend altogether on circumstances surrounding the train.

Q. Well, let's assume that this man designated by the conductor to take the place of the man who got off first, gets off and flags. Now, then, the conductor designates some one else to take his place, don't he?

A. No.

Q. He doesn't? Well, now, when the train is in the condition where it becomes necessary to flag, don't that same rule, 99, require that if necessary someone shall go out and flag the front end of the train?

A. There are conditions existing in which it is necessary.

Q. Just answer my question, you can answer that Yes or No.

A. What is the question?

(Question read.)

A. Yes, sir.

Q. Then you would have this peculiar situation, wouldn't you, of a man with a flag or a torch out front, marching along, and a man in rear, marching along, to protect both ends of this moving freight train?

A. Repeat that again, please.

(PALMER:) I want to object to that question as improper in

form, and assuming something that hasn't appeared in this
446 case, and that isn't at all reasonable, and is hardly supposable. There has been no indication in this case so far of the necessity of any man getting out and walking behind a train to guard the rear end, and I want to object further and I want to just say this to call the Court's attention to my ideas of this proposition right on this point. Counsel is assuming that if one man gets off to perform his dury under Rule 99 that the conductor will designate some man to take his place, and that possibly following that, this man that has been designated has got to get off and take his place. He has got the two men off from the rear end of that train. Now, there is no evidence to support it, there is no reason to support it, it is a condition that never exists and never could exist, because the first man back is the man that is stopping the train that is coming; that there is no possibility and no need and no occasion under the rule or in argument of counsel to say that it is necessary to put off the second man to protect the rear of that train. Now, I am calling Your Honor's attention to the line of this question, because I think it is improper, and it is a form
that I don't think should be allowed, because it is assuming
447 something in these questions to the jury all the time that doesn't exist in the case, and I want to interpose an objection on those grounds, so that we may find out.

(COURT:) In cross-examination, of course, we have to allow a great deal of latitude under the ruling of our Supreme Court. I know I have been reversed when I have held that a matter was not cross-examination, and rarely ever reversed when I have admitted a question as cross-examination. I don't know as I ever was. It has given not only this Court but all our Superior Judges the impression that we had to allow great latitude in cross-examination of the witness, even, oftentimes, when we couldn't see clearly that it was cross-examination. I remember one reversal that occurred in Addison County where I couldn't see that the question was cross-examination, and inquired of the counsel how he claimed it to be cross-examination, and he remarked that he was under no obligation to state that fact, and I said "Then we will exclude it as a cross-examination for we can't see how it is cross-examination" and the Court said we erred. So acting upon the experience that the Court
has had in the trial of cases, we feel inclined to let that ques-
448 tion be asked and an exception may be noted for the defendant.

(PALMER:) Of course, if Your Honor wil pardon me, I was addressing myself quite as much to this Court as I was to my rights in a future Court. It seems to me that counsel should not be allowed to assume such things.

(COURT:) Well, we hardly dare to exclude it under an exception. We will give the defendant an exception.

Exception by defendant.

(Question read.)

A. No.

Q. Then, you would say that if it was necessary to protect both ends of the train, that you wouldn't protect them?

A. Well, now, hold on a minute, you put a question up to me that it is almost impossible to answer in Yes or No.

Q. Well, all right, you have answered it No.

A. Well, I would like to explain that No.

(COURT:) Explain then, Mr. Witness.

(W. AUSTIN:) Yes, well, I will waive the question.

(COURT:) If you want to explain your answer, No, you may do so.

A. Now, if it became necessary to protect the rear of the train, there would still be one man left on the train in addition to the conductor and the engineer and fireman. Therefore if it was necessary to protect the train ahead, to get to the next station, the conductor would use either the fireman, or himself to protect
449 the train to the next station, moving ahead, not necessarily moving the train until he had arrived at the next station, or a sufficient distance in advance to protect the head end of his train.

Q. And the conductor is the man that decides that, isn't he? He is the man who says when it is necessary, isn't he?

(PALMER:) When what is necessary?

(W. AUSTIN:) What we are talking about.

(PALMER:) I object to the question as unintelligible.

(COURT:) Well, Mr. Witness, if you understand it, you may answer, if you don't, you may so state.

A. I don't understand the question.

Q. Well, what did you mean when you told me that when it was necessary, the conductor would send the fireman ahead or go himself, what did you mean by that? You know what the meaning of the word "necessary" is?

A. Yes.

Q. Well, that is all I ask you to say, whether it is the conductor who has the sole decision of whether it is necessary or not?

A. I still answer it, No.

Q. Then you want to change your previous answer, do you?

A. I don't know as I have changed anything.

Q. Well, why have you explained to us here that when it became necessary, the conductor would send the fireman ahead?

450 A. The conductor, or I should have added, that the engineer, sometimes the engineer is responsible in conditions existing for the proper protection of the head end of his train.

Q. Then the engineer, without the knowledge of the conductor, without the knowledge of the captain of this train, can send a man off from it ahead?

A. Sure.

Q. And now let's suppose this situation, suppose this freight train is moving along here at the rate that Mr. Amey assumes in his question, and suppose there isn't in fact any train behind

it, and that your man drops off from the rear, and who decides that, whether he shall do that?

A. There is no decision required.

Q. Oh, before a man acts, isn't there a decision made?

A. The rule provides for such contingencies as that.

Q. Before you step down from that stand, don't you decide that you are going to step down?

A. Don't I?

Q. Yes.

A. Yes, certainly I do.

Q. But first, I decide it, don't it?

A. I suppose you do, yes, but that is irrelevant to the question.

Q. You, in stepping down from that stand, have no control over the decision that you shall step down, do you?

(PALMER:) Now, that is objected to.

(W. AUSTIN:) I am trying to make it clear to the witness whet he claims is an obscurity in my interrogatory. If he under-
451 stands the difference between making the decision and performing it, I don't need to ask those questions.

(PALMER:) Now, I want to be perfectly fair with counsel and with the Court, and I interpose the objection to this question, and I want to have it relate to the main question, as to whether it was he decided whether it was his duty or not. Now, if Your Honors please, that question was called out first here yesterday afternoon to Mr. Maun, and Mr. Maun testified just as this witness has testified, substantially, at one point in his examination, that it was a question for the rules. Now, the purpose of this question, and the explanation of the question, and the interpreatation of the question is to get the question to say that somebody has a right to determine and judge of the necessity at that point. Well, now, that isn't so, it wasn't entirely clear to me last night just how this matter came up, but assume, if Your Honors please, that you issue an order that I shall file a pleading at nine o'clock tomorrow morning. Now, have I any discretion in that matter, is there anything for me to do except to acquire the information as to when nine o'clock comes. Is there anything, is there any discretion left with
me? Not at all. I have got to prepare my pleading and
452 at or before nine o'clock tomorrow morning, I have got to file it. Supposing Your Honor should say to me, "I have heard enough of your talk, Palmer, and now unless you stop it in two minutes by that clock, I will find you for contempt." Well, now, is there any discretion on my part? There is a rule, there is an order, now it isn't a question whether or not I have the right to judge and determine for myself whether I will obey that order or not. It isn't a question whether the flagman has a right to judge of the necessity of getting off. What he has got to do is to acquire the information if that condition exists which the rule specifies. Now, the rule says, "If the train is stopped on the main line, it is his duty to get off and do certain things. Now, there isn't any discretion to be used by him. What an idea it would be that of these thousand trainmen, each one could exercise his own

judgment in construing a rule; that is the purpose of the rules, and it is the purpose of the rules, and the trainmen so understand it, that when the condition which makes the rule operative is reached, then it is their duty to act. There isn't any discretion in it at all. There isn't aby reserve right to pass upon the question of
453 whether he shall get off or whether he shouldn't get off, and as this matter was on my mind last night, I could understand very well how Mr. Maun naturally said that he couldn't answer that question, because he was limited right to the proposition of whether or not the trainman, the flagman, was the sole judge of that proposition.

Now, if I have made myself plain, it is that this question that the counsel is seeking to ascertain from this witness, and did from Mr. Maun, is and relates to the question of the flagman's right to judge for himself when the time came when he was to act—well now, I say the rules determine that, and the only question for the flagman to determine is, has the condition arrived? Then the rule controls, not the flagman.

(COURT:) Well, the Court will say as did last night, that our views coincide with yours but the manner in which the case has been conducted on the part of the defence, has not been upon that theory. You have gone into the construction of these rules. You have not left that for the Court to determine, but the expert question has been asked, a hypothetical question that has been asked by Mr. Amey has been addressed to what was the duty of this in-
454 testate. Well, now, we allowed it because no objection was made, but we have the further right, that door having been opened, to let the other side, as we view it, go in and meet that fact, and it is with that view that we are letting this evidence in, letting this inquiry go in, and we deem it is proper cross-examination. It would certainly be error for us to permit the one side to go into the duty outside of these rules, and not leave the rules to determine it, and then tie the other side down to it. As I said last night, my views coincide with yours, but another principle has entered in to this examination which takes it out, as it seems to us on cross-examination, of that position, so we allow this question with that view, as cross-examining this witness. As the case now stands here, that is an issue for the jury, if it is a fact. That is the view that we take of the case, the question may be answered and an exception noted for the defendant.

Exception by defendant.

(Question read.)

A. No sir.

Q. Now, that is what I mean by the language of my question, and I am going to try to repeat it to you. In determining when the circumstances have arrived that makes it necessary to flag a train, who has the say on a freight train?

455 (PALMER:) My exception may be allowed, objection allowed to this question, I take it?

(COURT:) Well, that is practically the same question.

Exception by defendant.

Q. And if he does not know of the existence of the circumstances mentioned in the rule, then he is perfectly justified in not getting off from a train, isn't he?

A. He isn't justified in not knowing.

Q. That calls for an answer Yes or No.

A. That question can't be answered Yes or No.

Q. And you would say that a flagman on a freight train, under the rules, has a right to do anything he pleases, would you.

A. His actions and duties are already pre-arranged by the rule book.

Q. And he could get off the train, whether it was necessary or not, could he?

A. Yes.

Q. Whether it was running fast or not running at all?

A. Well, if he was doing his duty, he should be off before they are stopped.

Q. And whether it is running slow or not?

A. He should be off before they stop.

Q. He can get off or he can stay on, he can do anything he pleases, can he?

A. I don't admit it—I don't recognize that question right, I don't understand it right.

Q. Well, now you are assuming that the flagman is the
456 sole judge of that matter, and we will assume that a train is running along at the rate of speed mentioned by Brother Amey in his question to you, and we will also assume that there isn't any train behind, but this man decides that the conditions have arisen in which he must get off, so off he gets. The train goes along, and it accelerates speed and goes away and leaves him. He stays there and flags and flags and flags, and no train comes along, no train picks him up. His train goes along about its business, and they hit a grade, and slow down to ten miles an hour—and the man the conductor has put in his place, I suppose assumes his duties. doesn't he?

A. Under certain conditions, yes.

Q. Well, doesn't he have to obey all the rules that the rear flagman has to obey?

A. Yes, if he has been put in that position by the conductor.

Q. Well, we will assume that he declines, because then he is the sole judge, you say, of whether the conditions have arisen in which he should get off, and he gets off, the train goes along, and accelerates speed, and in fact for miles it doesn't hit a grade, but finally it hits a grade and slows down to ten miles an hour, and the man that the conductor has designated to take his place, decides that it is time to get off and flag, and he hops off and flags and flags and flags, and nobody shows up, and the train
457 proceeds along on its way. You would say that was not railroading, wouldn't you, I mean safe railroading?

(PALMER:) I desire to object to that question, if Your Honor please, because it is assuming something that has not appeared in the case, assuming something that couldn't, that absolutely couldn't ap-

pear; that when the first man gets off, it is to stop the approaching train, and there is no occasion under the evidence or under answers or under any theory that other men that should get off to stop the same train that the first man got off to stop; it is assuming something that has no relation to any fact or evidence disclosed by the rule or the evidence of witnesses in this case.

(W. AUSTIN:) May I address the Court? I haven't tried to answer a good many of these arguments because I didn't want to waste the time of the Court, but I do want the Court to understand my position. I agree with Brother Palmer exactly about the meaning of that rule, as he disclosed it in his argument, but my question is addressed at the absurdity of the interpretation of the rule made by this witness. It is cross-examination of his skill and judgment. That is what it is, I don't claim, I don't offer
458 to show that it is necessary for the second man to get off, I don't offer to show that it is necessary for the first man to get off, unless indeed there is a train following and it is known to the brakeman. Brother Palmer assumes in his argument that the rear flagman knows there is a train approaching, that that is why he gets off, and having gotten off, there is a man who takes his place, knowing that there will be a train stopped behind him, that will intercept all other trains coming behind them, will not find it necessary to get off. In other words, that that part of the rule, namely, "under conditions in which it is likely to be overtaken by a following train" is an essential part of the rule. I agree with him in that, and when he assumes that, I say he is right, but my question doesn't attempt to show the contrary, it attempts to show exactly the same thing by showing that this witness' testimony in interpretation of the rule, is absurd.

(Question read.)

(COURT:) That is the same in character, a hypothetical question. If it embraces matters that have not been testified to, why it
459 would be error to receive it, and I am inclined to exclude that question and give the plaintiff an exception.

Exception by Plaintiff.

Q. Now, you would have to take into consideration the effect of your interpretation of a rule, wouldn't you, in interpreting it?

A. Sure, certainly.

Q. And a brakeman on a railroad is just as much bound to do that same thing as you are here testifying in a court of law, isn't he?

A. No.

Q. Oh, he doesn't use intelligence but you do?

A. Excuse me, I hadn't finished my answer. I haven't finished my answer yet.

(PALMER:) I object to this manner of examination, of whether the brakeman is using intelligence, or whether he isn't. That isn't the question here, and I think it is improper for counsel to assume those things as he goes along in this examination, and I desire to interpose an objection, and I don't want to be intolerant of the Court.

(COURT:) We should hardly dare to exclude that, Brother Pal-

mer, as cross-examination, and he may answer the question, and an exception — noted for the defendant.

Exception by Defendant.

460 Q. Is that so?

A. Hold on, now, excuse me a minute, you don't give me a chance to finish the answer to your previous question.

Q. Now you can finish it then.

A. He must be instructed in the proper interpretation of the rules, before he is allowed to use his judgment.

Q. Oh, well, I am assuming, I am assuming that he is so instructed, or else that the Company won't put him out running one of its freight trains. The companies don't do that, do they?

A. No.

Q. Well, then, assuming that, you would have it stand "No", would you?

(Question read.)

A. Yes, with that exception.

Q. Then you would have him wholly disregard the consequences of his construction of the rule, would you?

A. Of his construction, what do you mean by that?

Q. Just what I say.

(COURT:) You have taken up so much time, the witness may not clearly understand the question and its connection.

(W. AUSTIN:) All right, I will repeat what I have in mind then.

Q. You have testified in telling this jury what a rule means, and that is what I mean by the word "construction", that you take into consideration the consequences of your construction of the

461 rule, and I asked you if a freight brakeman ought not to do the same thing, and you have said, "No", and now I ask you if he should disregard the consequences of his construction of the rule in construing it?

A. That is a question I can't understand or answer the way it is put.

Q. And yet you pose here as an expert on these rules, do you?

(PALMER:) Well, he isn't an expert on your questions, the intelligibility of your questions.

(Objected to, question excluded.)

Q. Now, you have sworn positively and with great emphasis that it is impossible to give trains running in the same direction orders that will show their exact position. I want to ask you if you take that position, that stand, with reference to giving them orders showing their relative position to each other, and to stations in connection with the train despatcher's office?

A. Do you mean their exact location?

Q. No, that is just what I don't mean.

(Question read.)

(PALMER:) I don't quite understand it now, I don't know but it is intelligible.

Q. I don't understand the question.

A. Do you know what the word "relative" means?

462 A. Yes, sir.

Q. And you know what the word "exact" means?

A. Yes sir.

Q. Well, now, I am distinguishing between the two. You have said that you couldn't give their exact position. I am asking if you couldn't give their relative position.

A. Are you asking as to the railroad as a whole or that individual train concerned?

Q. My question limited it so you could clearly understand exactly what I meant,—relative to each other and relative to the stations that are in connection with the train despatcher's office?

A. It is practically impossible to do so.

Q. It is. Well, then, how in the world do you do it with two trains that are running towards each other?

A. You don't give the exact information.

Q. Well, that is just exactly what I haven't asked you.

A. Well, you don't give them the relative situation.

A. Well, let's see, here is the first order I lay my hands on. "P. M. to engine 708, White River Junction. Engine 708 run extra White River Junction to Roxbury, and meet extra 403 South at West Hartford." Doesn't that give the relative positions of those two trains?

A. Not necessarily.

Q. Well, could you do the same thing with reference to two trains running in the same direction?

463 A. You could to a certain extent, yes.

Q. You could to this extent, couldn't you? You could give 708 an order "Run extra White River Junction to Roxbury and follow 401"?

A. You could—but——

Q. And the rules provide for just that kind of an order, don't they?

A. No, sir.

Q. And do not the rules provide a form that would be given the preceding train like this? "Extra 401 run ahead of extra 708 White River Junction to Roxbury."

A. That is all right.

Q. They do, don't they?

A. Yes, hold on a minute, you are citing two different questions, altogether, there Mister.

Q. Well, answer that one.

A. That rule is, at least that form of order is in the train rule book. Yes.

Q. And when that form of order is given, it adds safety to the operation of the two trains, doesn't it?

A. I don't understand it that way.

Q. Well, then, what is the sense of this, "Under this sample, the

second train will run with such caution as will prevent accident with the first named train."

A. Well, now, I can explain that satisfactorily, if you will just give me a little time. That order is issued to an extra train that takes, or at least, that goes on the time of a regular schedule train, and without that order, that extra train has no right to move
464 on the time of that regular train.

Q. Exactly. And it don't make any difference what the reason for it is, it says, doesn't it, and you will have to admit, won't you, that it is possible for a train despatcher to issue such an order?

A. In that identical case, yes.

Q. Well, does it make any difference whether it is in that identical, or in some other case?

A. Decidedly so.

Q. Well, then, you say that if it is possible for him to give such an order to 401 at White River Junction when there is a passenger train ahead of it or a passenger train behind it, that it wouldn't be possible to give that order to that 401 under any other circumstances, do you?

A. I didn't say any such a thing.

Q. And you don't mean any such thing, do you?

A. I mean just exactly what I testified to there in that regard.

Q. When you settle right down upon facts, it is just as easy, isn't it, for the train despatcher, to telephone White River Junction to a train coming north as it is to a train going south?

A. He would have no occasion to telephone to a train going south.

(Answer stricken from record.)

465 A. Why, yes, it is just as easy, there is no difference.

Q. And it is only twice as hard to telephone to two trains as it is to telephone to one, isn't it?

A. No sir.

Q. And he is paid for doing that, isn't he?

(Question excluded.)

Q. That is the method used to communicate these orders now on the Central Vermont Railway Company, isn't it?

A. I don't know that it is. I understand it was telegraph.

Q. Well, lets assume then that there is a telegraph office at White River Junction and one at St. Albans. That wouldn't make any difference, would it, about the facility of his conveying an order?

A. No sir.

Q. And it would be just as easy for him to telegraph two trains as it would one, except for the additional work, wouldn't it?

A. It would be so, yes.

Q. And the fact that they are running north or south doesn't change that, does it?

A. No.

Q. And wherever there was a station with a telegraph instrument in it, and a man to operate it, that despatcher could find out when a train arrived at it, couldn't he?

A. Yes.

Q. And he could let the other train know when it had arrived at that station, that the first train had arrived at such an hour?

A. Nor practically possible.

Q. Not possible?

A. I said "practically possible".

466 Q. Not practically possible. All right, we will leave it there.

Redirect examination by Mr. AMEY:

Q. He called your attention to page 43. I show you page 43 of Plaintiff's Ex. B and ask you to look at the second paragraph above the bottom down there. Read that, and tell me its application, Mr. McCarthy.

A. Its application to this part of the order?

Q. Well, its application generally, or particularly, either way.

A. Well, in the first place, that order No. 3 is only issued to the inferior class trains, in order for to give them authority to run ahead of superior class regular trains, and it is very seldom used, except from one station to another.

Q. Now, why is that so, Mr. McCarthy?

A. The rules provide that extra trains are inferior to all regular trains, and if an extra train should go on the time of a regular train, she would have no authority to run on that schedule without this order.

Q. As I understand you, extra trains are all of the same class, that is, they have equal rights, don't they?

A. They all have equal rights, yes.

Q. And is that the reason why the Rule 99 applies, is that the reason why you require the application of rule 99 for pro-

467 tection?

A. Well, Rule 99 applies to all trains, and it applies to all trains in this way, that on account of extra trains, running without schedule, it must be thoroughly understood by all concerned that an extra train is to be run over the road at any time the traffic requires it. Therefore an extra train following a regular train or any other train, is due at any time.

Q. And you have heard the testimony this morning about the number of trains on the Central Vermont Railway, running?

A. Yes sir.

Q. Would it be possible to do the traffic business that is done by this road, and have any other method of protection except to require a flagman to protect his rear end?

A. Impossible.

Q. And get your trains over the road?

A. And get the trains over the road. There is nothing impossible as far as that is concerned, but practically impossible to follow any other rules but these on that respect.

Q. Tell about the speed of freight trains generally, is there any?

(W. AUSTIN:) That isn't re-direct, we object to it.

Q. Taking into consideration the facts that existed on this night of Jan. 12, as you understand it, was there any occasion for
468 protecting the front of 401?

A. No sir.

Q. Is there anything in that paragraph that I have just shown you about which my Brother Austin inquired, to relieve the rear flagman from protecting the rear end of his train?

A. No sir.

Q. Now, 401 on the night of Jan. 12 was between, when it was struck, was between Randolph and Braintree, I think that is the next station north, assume that it was, 708 come into Randolph and left there next after. Now, until those trains arrived at the next station or at a siding somewhere, was it possible for any other train to get in between them?

A. No sir.

Q. Now, sir, I want to ask you a little further about Rule 99, you are familiar with its language?

A. Yes, sir.

Q. And on the Central Vermont Railway at the time of this accident, considering the number of trains that were running, you may say whether 401 was liable to be overtaken by a train at any time?

(W. AUSTIN:) That isn't re-direct——

A. It certainly was, at any moment.

2.00 P. M.

Q. Mr. McCarthy, in this case 401 left White River Junction at six o'clock and 708 left White River Junction at 10.12, both
469 coming north. Assuming that to be the case, would there be any occasion for 401 to be notified that 708 was coming?

(Objected to as not re-direct examination.)

A. No sir.

Q. Now, you have spoken about the protection of the forward end, is that to protect against trains that are coming in the opposite direction?

A. Yes sir.

Q. Now, you have spoken about the brakeman getting off, or the flagman getting off, to flag the following train, to stop it. Your attention was particularly called to the train 401 as it passed over the road between Randolph and the place of the accident. Now when a flagman is sent back to protect against a following train, is it sometimes the practice for the forward train to stop and pick him up?

(W. AUSTIN:) That is leading.

Q. Withdraw the last part of it, and ask you whether he sometimes comes back and takes the train, off from which he alighted, to flag?

A. Generally the custom when recalled.

Q. And how is he recalled by that train?

A. By the whistle signals from the engine.

Q. Now, supposing he is picked up by the following train, what is the practice of the forward train, what does that do to get him back again?

470 A. As a general rule, they proceed when able to the first station or telegraph office, and either wait till their flagman arrives on a following train, or arranges to get clear to let the following train by.

Q. Let the rear train by?

A. Yes sir.

Recross-examination by Mr. W. AUSTIN:

Q. Now, you say in re-direct examination, that under circumstances detailed by Mr. Amey in this case, in asking these hypothetical questions of you, that wouldn't be possible to protect the front end of the train, 401, by a flagman. I want to know why that is so.

A. In this particular case, you mean?

Q. In the case detailed by Mr. Amey to you.

A. Well, there are certain reasons when it becomes necessary for a train to be protected from the front end, for instance, in the case of an extra train, if they are delayed between two stations to such an extent that they can't make the station in advance for some overdue superior train going in the opposite direction. It is the duty of the crew on that train to protect against such a train, or in other words, if they have not time for to clear the schedule of a superior train of a station in advance, it is their duty to protect themselves against them.

471 Q. Then, knowledge of an approaching train is one of the essential things, isn't it?

A. Yes, sir.

Q. And the traffic described by Mr. Amey, the great traffic on this Central Vermont Railway Company, is south as well as north, isn't it?

A. Yes, sir.

Q. And in order for a flagman who had been put out to flag the rear end of a train, to re-embark upon it, the train must be stopped, mustn't it?

A. The train from which he left?

Q. Yes.

A. Yes, sir.

Q. And wait for him to come back?

A. Yes.

472 JOHN ROURKE, called by defendant.

Direct examination by Mr. AMEY:

Q. What is your business?

A. Assistant Superintendent Boston & Maine Road.

Q. How long have you held that position?

A. Since 1905.

Q. And as Assistant Superintendent, what are your duties?

A. Supervision of the territory under my charge.

Q. You have charge of the men?
A. Yes, sir.
Q. What was your business prior to that?
A. Chief Train Despatcher.
Q. For what road?
A. Same road.
Q. And prior to that time, what was your business?
A. Train Despatcher and Telegraph Operator covering a period of twenty-six years on the Boston & Maine.
Q. Are you familiar with the standard rules?
A. Yes, sir.
Q. Is the Boston & Maine Railroad being operated under the Standard Rules?
A. It is.
Q. Is rule 99 in the Rule Book of the Central Vermont, a standard rule?
A. It is.
Q. The Standard Rules were adopted for what reason, was it for uniformity or safety or for what reason?
A. It was for the purpose of obtaining uniformity, and to obtain the best rules possibly attainable from the judgment of the
473 railroad managers of the country who meet in committee and convention and discuss those matters.
Q. You may tell the jury what Rule 99 requires of the flagman.
A. When a train is stopped or is delayed, the flagman must be governed by Rule 99, in its entirety, and it is very explicit. He must go back a sufficient distance for the full protection of his train, and when recalled by the whistle of his train, must leave the required appliances for the protection of his train while he is returning and while the train is getting under way. That includes torpedoes in the day-time, and in addition, fusees in the night-time.
Q. Now, after he is sent back, or goes back for the purpose you have stated, how does he proceed over the road after that? Whether he goes back and takes his own train, or what does he do?
A. He is governed by circumstances, the conditions. If conditions require, he might not return to his train on the whistle recall, because he might discover that there was a train coming behind him, and he might remain and stop that train, or in the absence of conditions covered by the rules, and mentioned in the rules, he would return to his train and proceed with it.
474 Q. Well, when is the flagman whistled in, called "whistling in the flagman?"
A. When the train is ready to proceed.
Q. That is, the train ahead, the train from which he alights?
A. Yes, sir.
Q. What would you say in regard to the necessity under that arrangement, of ever stripping a train of its crew?
A. I have never known any such thing to occur.
Q. Assuming or supposing that he does not go on his own train ahead, but takes the train that he flags, what happens then, what does the forward train do?

A. It may do anything, it may take the first side track, or it may continue on.

Q. Assuming that after he goes back to flag the train coming behind, the forward train makes up time, gets up the ordinary rate of speed, or increases its speed, what happens then, does it stop to let the other train by?

A. It may do so, yes, sir.

Q. And assuming the situation of this case, this train left Randolph six minutes ahead of 708. Supposing, prior to this collision, the rear flagman had got off there, and he had found that train coming, that 708 coming, and assuming that he gets on to that 708 instead of going back to 401. The next siding is Braintree. Where does he get back onto 401, or where might he get back
475 onto 401?

(COURT:) Well, now, that is practically the same question that you objected to when Mr. Austin was cross-examining and that we ruled out, isn't it, Mr. Amey? It is a hypothetical question that you don't claim is supported by evidence, do you?

(AMEY:) I withdraw it.

Q. You may explain why in the practical operation of railroads, railway trains are not stripped of their crew by sending flagmen back to come along with the following train?

A. Well, as I said before, I never knew of an occurrence of that kind to occur. I don't think there is anything in the execution of the rules there that might bring about a situation of that kind.

Q. I will ask you—you heard all the evidence in this case, haven't you?

A. Practically, yes, sir.

Q. I will ask you if there was anything to prevent, under the rules 401 from taking the siding at Braintree and letting 708 by?

A. That is their privilege according to the rules.

Q. Why is it safer, Mr. Rourke, to require a flagman to take care, protect the rear end of his train, under 99, than it is to attempt to notify different trains of the location of others at different stations along the road, when they are going in the same direction?

476 A. That is a question that allows of a lot of reasons. To commence with, it doesn't seem in any way to have been found in the operation of railroads practical to notify a following train of the location of a preceding train at all times, whereas a flagman on the preceding train can always, if occasion requires, signal to the following train and notify them of the exact location of his train. It isn't a practice that I have known to be in effect on any railroad within the last twenty odd years to attempt to do so. In my own experience, years ago, orders were given in a way that was supposed to notify one extra train of the fact that another extra train was running on the road, but the practice brought around conditions that were found to be dangerous. That is, it was impossible to anticipate the location. That brought about divided responsibility between the flagman and the notification.

Q. I am going to ask you this long question. Two extra freight

trains left White River Junction, coming north on the main line of the Central Vermont Railway, on the 11th day of January, 1912. Assume that 401, the forward train, left at six o'clock, and 708 at 10.12 o'clock in the afternoon; assume that 401 was delayed
477 on the road between White River Junction and Bethel at West Hartford, for a space of time in the vicinity of half an hour, and assume that 401 arrived at South Royalton at 9.20, and left there at 11.00 P. M.; assume further that 401 stopped at Bethel, arriving there at 11.52; and leaving there at 12.15; and arrived at Randolph at 12.50, and departed from Randolph at 12.54, on the morning of January 12, 1912; assume that from Randolph to the place of accident, 401 made an average speed of from eight to ten miles an hour. Assume further that from White River Junction to the place of accident the flagman of 401 put out no torpedoes or fusees at any place. Assume that 708 arrived at Bethel at 12.30, departed from Bethel at 12.36, and arrived at Randolph at 1.00 o'clock, and departed from Randloph at 1.00 o'clock on the morning of January 12. Assume further that the engine of 708 was leeking steam to some extent; that at times it blinded the engineer, so that he could not see ahead, and assume that he claims that he could not see the tail-lights of 401 after he left Randolph that night. Assume that at a point 1.625 miles, or 1-4/5 miles, west of Randolph Depot, 708 ran into the rear of 401, and by
478 the impact killed the plaintiff's intestate; what should Flagman White have done, Flagman White of 401 done that he did not do?

A. He most emphatically failed to protect his train as required by rule.

Q. Assuming what I have said, what should he have done at Randolph?

A. He should have gone back until recalled by the whistle of his engine and placed the proper appliances on the track to warn any train that might be coming, and after returning to his train and while it was getting under way, he should have used fusees as the time required, that is what he should have done.

Q. Assume what I have already said in the previous question, and further that White was directed at Randolph by his conductor to protect the rear of his train. What should he have done?

A. Just what I have stated, whether the conductor told him or not.

Q. Assume further what I have already said in the previous question, and in addition that the conductor of 708 received a 19 order and clearance card at Bethel, and that the clearance card read as follows: "Central Vermont Railway Company, clearance. Bethel, Vermont, 1/12/1912. Train 708. I have orders 4 for your train. The next train ahead is blank. It left this station at —. Arrived at —. Signal is displayed for orders, and does not now affect
479 you. Sherlock, Operator. This does not affect any train orders you may have received. Conductors and engineers must each have a copy and see that their train is correctly designated in the above form." And assuming further, in that connection, that 401 left Bethel from twenty to twenty-three minutes ahead of

708, would it still be the duty of the flagman to put down torpedoes and fusees at Randolph as you have stated?

A. Yes, sir, it would.

Q. And would it still be his duty to continue putting out fusees from Randolph to the place of the accident, as you have stated?

A. Yes, sir.

Q. Assume what I have already stated in the previous questions, and further, in addition to what I have already said, Flagman White was inside the caboose, sitting down, smoking, was he doing his duty?

A. He was not in his proper position.

Q. Where should he have been?

A. He should have been on the alert, for the purpose of protecting his train.

Q. Assume all I have stated in the previous questions, and further that in addition to that, 401 was a compound, low-wheeled engine, incapable of making the speed that could be made by 708, which was a high-wheel engine; would it still be the duty of Flagman

480 White to put down torpedoes and fusees as you have stated?

A. Yes, sir.

Q. Assume further all that I have stated in the previous question, and that Flagman White did not know that 708 was following him. Would it still be his duty to put down the torpedoes and fusees, as you have stated?

A. It would.

Q. Assume all I have asked in the previous questions, and further that Flagman White had worked for the company during the last engagement, since December 9, 1911, and knew that trains were frequently running over the road in both directions. Would it still be his duty to put down torpedoes and fusees, as you have stated?

A. Yes, sir, in accordance with Rule 99.

Q. Assume further all that I have asked you in the previous question, and that he was a competent man and understood his business, namely, that of flagman, did he fail in the performance of his duty in not putting down torpedoes and fusees at Randolph?

A. Yes, sir.

Q. And from Randolph, and in not putting down fusees from Randolph to the place of the accident?

A. Yes, sir.

Q. Does Rule 99 place the duty of protecting the rear of the train upon the flagman?

A. It does.

Q. And is there any chance for discretion on his part about it?

A. Except to comply with the requirements of the rule.

481 Cross-examination by WARREN AUSTIN:

Q. You say that you have never known, in some twenty odd years, of railroad life, of a single instance where such an interpretation was made of Rule 99 as to strip a train of its crew?

A. Never.

Q. And no such interpretation should ever be made of that rule, should it?

A. I don't think it could be.

Q. Well, you don't think it should be, do you?

A. I don't think it should be, Mr. Austin.

Q. Now, then, about these signals, about notification of trains, on the same track, running in the same direction—notwithstanding what Brother Amey has asked you and you have answered, isn't it true that as a matter of fact the Standard Rules do require that notification?

A. They do not.

Q. Then you would wholly disregard the rule requiring notice to be given in a clearance card of the time of passage of the last train ahead, would you?

A. I don't know any such rule.

(W. AUSTIN:) Oh, that is all.

(WITNESS:) I wish to explain.

(W. AUSTIN:) Oh, that is different,—you mean you wish to qualify.

A. I wish to explain, sir.

Q. Well, go ahead, make your explanation, please.

482 A. I don't know any such rule that would require what you have asked as applied to my testimony, sir.

(W. AUSTIN:) That is all, you are excused.

(WITNESS:) Thank you.

Redirect examination by Mr. AMEY:

(W. AUSTIN:) I object to his showing him any rules, that isn't re-direct.

(AMEY:) I am not going to show him the rules, I am just going to show him those clearance card forms which my brother referred to.

(W. AUSTIN:) Yes, well, I object to his showing those forms, because there are rules printed in connection with them on the same pages. This witness has said he don't know about that, and I object to his showing them to him.

(COURT:) Well, that is hardly re-examination, is it, Mr. Amey?

(AMEY:) I would like to have the last answer of Mr. Rourke read.

(Answer read.)

(Counsel at the bench.)

(AMEY:) I offer to show by this witness in re-examination that there is such a thing as a clearance card, and there is such a thing as a combined clearance card, and I offer to show the effect of

483 it, and what it means, asking him these questions as an expert.

(COURT:) Well, as re-examination? Do you offer it as re-examination?

(AMEY:) Re-examination, yes.

(PALMER:) I don't think we should be confined to re-examination, we should ask the indulgence of the Court.

(COURT:) He is putting it down there to that. I should exclude it as re-examination, Mr. Amey, but if you wish to show that the witness is mistaken in his last answer, as a matter of discretion, we should allow you to do it.

(PALMER:) Well, it isn't a mistake, we don't say it is a mistake, but he was inquired about as to a rule. Well, this form is not a rule, and he has. Mr. Austin has got him to testify that there wasn't any such rule; as the contents of this form discloses, it is a form and it isn't a rule, he hasn't made any mistake.

(W. AUSTIN:) When a statement contained in that book includes the word "must" and commands what must be done, it strikes us that after every railroadman on both sides of the case have come forward and testified that those were rules——

484 (COURT:) Here is what has been the embarrassment of the Court all the way through. We have been receiving evidence that in the Morrisette case, was excluded right straight through. The Court, in that case, held emphatically that a witness could not testify as to what was the duty. We offered to show it and they held that to be the fact that they couldn't show what was the duty unless they showed that it was something outside of the rules themselves; that they couldn't show what his duties were under the rules. Well, now, we have let in a multitude of that evidence, that being the case, it makes it very embarrassing for the Court, because my own views are that such evidence was not admissible, but having received it, we have got to go into it. That is the reason of many of my rulings with reference to that matter. Well, now, having gone into it, I am inclined—we think as a matter of discretion, we will let you go into it, although as we have said, we have gone into it so far, I think we can't turn around and go back on our ruling, when we allowed a lot of this evidence in because it wasn't objected to, and we shall let you into it to a certain extent. We

485 shouldn't want to take up a large amount of time and go over a large field, but so far as indicated, we shall as a matter of discretion, let you go into it.

(W. AUSTIN:) If he opens the door——

(COURT:) If he opens the door, we shall let you into it, of course, we have got to.

(AMEY:) That is all right.

Q. Did you mean to say, Mr. Rourke, that there wasn't any such thing as a clearance card?

A. I don't think I did say so, sir.

Q. I show you Plaintiff's Ex. R and ask you what that is?

A. Clearance Card Form A.

Q. And does that indicate that the train was stopped for orders?

A. "Train 708, I have orders 4 for your train, next train ahead is —, left this station at —, and arrived at —, signal is displayed for orders. It does not affect you. Sherlock, Operator."

Q. Now, what would your answer be to the last question?

A. It does, yes, sir.
Q. And what does that mean, Mr. Rourke?
A. That the order board was set in a stop position, and that the train 708 was stopped by it. It indicates that they received order No. 4, and that was the purpose for which the order-board was
486 set in stop position, as indicated by the reading of the order, where it says, "Signal is displayed for orders."
Q. Now, assuming that 401 had been gone from Bethel twenty-one minutes, from twenty to twenty-three minutes, would there be any occasion in stating in that clearance, the time when 401 left Bethel station?
A. The rules wouldn't require it.
Q. And do you refer to Rule 91?
A. I believe that is the number, yes, sir.
Q. And why would they not require it?
A. Freight trains are required to be spaced five minutes at stations by the rule. The fact that 708 was stopped at Bethel was an incident because of the order, the board was set for that purpose, and not required by Rule 91 to block 708 and 401.
Q. I show you form A which is the clearance introduced in this case, and ask you to look at it and tell me what it is.
A. Clearance card, combined clearance card, orders and block, may be used for clearance on a board for orders, or it may be used as a clearance on the board for a block, or both, it may be used for both. The train may obtain orders and also a clearance on the block.
487 Q. Now, "I have orders 5, 7 and 9," what does that mean, Mr. Rourke?
A. Orders No. 5, 7 and 9.
Q. And now what does "nil" in parentheses mean there?
A. Means not, nothing.
Q. That is, there may be orders for the train and there may not be?
A. That is the idea.

(W. AUSTIN:) Well, do you claim that the rule at the bottom of that page is ambiguous?
(AMEY:) Well, I haven't got down to that yet.
(W. AUSTIN:) Well, if the Court please I would like an answer to that question, there is a rule at the bottom of the page that explains the use of those expressions, and the filling of those blanks, and directs how they shall be filled.
(COURT:) That being the case, do you claim——
(AMEY:) No, I won't pursue that any further, if that is the case.

Q. What does the word "block" mean down there, that isn't explained in the foot-note.
A. Block means that a signal is displayed as a block signal, blocking the train or spacing it for the time required by rule.
Q. Now, sir, did you mean to say in your answers, in cross-examination, that there was no rule that required the notification of a train ahead under any circumstances?

488 A. I don't think I said so, I think I qualified that by saying that there was nothing in my direct testimony in answer, no necessity of a clearance card to that.

Q. Now, sir, let me ask you if there is under the rules ever any occasion for notifying a train of the train ahead, of any train ahead?

A. May I refer to your Rule, sir?

Q. Yes, sir.

A. Rule 91 explains that.

Q. And does that apply to this clearance card?

A. The clearance card is used in connection with Rule 91, when necessary.

Q. And when is it necessary to notify the train behind of a freight train that has left a particular station, that is, of the time when it left?

A. When it is within the time specified in this rule.

Q. And that is five minutes?

A. Yes, sir.

Q. And what about passenger trains?

A. The time is twenty minutes.

Q. Well, is that always twenty minutes? You look at that rule carefully.

A. I believe I answered your question. Is there another question? You asked me for the time.

Q. What about the block of passenger trains?

489 A. Until a report is received of its arrival at the next station ahead, except that a train should follow twenty minutes after the departure of a train carrying passengers, or operating a snow-plow, when either the station from which it is to follow or the next station ahead, is not a telegraph station.

Recross-examination by Mr. W. AUSTIN:

Q. Now, Mr. Rourke, will you point out what sentence in Rule 91 requires the use of the clearance card?

A. The clearance card is not mentioned in Rule 91.

Q. Now, will you point out a sentence or sentences in Rule 91 that excuses the filling out of the blanks in a clearance card?

A. It is not mentioned.

Q. Now, will you point out in Rule 91 where it says what the time limit on a clearance card is?

A. It doesn't mention a clearance card.

Q. Now, if you will turn to Rule 221 on page 40, the third paragraph of the rule, and we find there a command, don't we?

A. Yes, sir.

Q. That directs and commands the use of a clearance card, does it not?

A. Yes, sir, when a train is stopped by an order signal.

Q. In this case called to your attention by Brother Amey this train 708 was stopped for that order No. 4, mentioned in the clearance card, wasn't it?

A. Yes, sir.

Q. Exactly. Now, when that rule says, as it does, "A
490 train stopped by a train order signal must not proceed," that means they have got to stay there, don't it? The usual meaning is adopted in that rule, isn't it, that is given to the English language? The words "must not proceed" are given the usual meaning, are they not?

A. Until certain qualifications are fulfilled, yes, sir.

Q. Yes, the usual meaning is adopted by you in interpreting that rule, isn't it?

A. Oh, yes.

Q. Now, the condition in the rule is, is it not, that they must not proceed without a certain clearance card, namely, clearance card form A or a caution card form C although they have received other train orders?

A. That is correct.

Q. Now that don't mean, does it, that they are to take that clearance card without a thing written in to the blank spaces?

A. It must state for what the order board is set, yes, sir.

Q. It must state what is stated on page 122, mustn't it?

A. I don't know what page 122 states, without referring to it, sir.

Q. Well, please refer to it.

A. All right, sir, all right.

Q. Now, the giving of that blank without filling in those lines wouldn't be a compliance with Rule 221, would it?

491 A. It must state——

Q. Just say Yes or No to that.

A. Yes, and I will explain.

Q. All right.

A. I must state for what the train order board is displayed.

Q. You think that the giving of that blank clearance card without the filling out of a single blank in it would be a compliance with Rule 221?

A. It would not.

Q. Now, would you have any more right to disobey the command in that rule with reference to any one blank than another?

A. Which rule do you refer to, sir.

Q. This which I have read to you. "The numbers of orders for the train must be filled in in figures." You regard that as a command, don't you?

A. You skipped something, sir.

Q. Well, answer my question.

A. I should have to take it in its whole.

Q. Well, answer my question.

A. I don't understand your question as applied to that reading.

(Question read.)

Yes, sir.

Q. Now, then, if there is any other thing commanded to be done with reference to the filling out of that blank, it is just as solemn as that is, isn't it, just as binding?

A. If it is required to be filled out, yes, sir, in the manner
492 which the rule states, or the note, rather, it isn't a rule.
Q. And unless it is so done, it is not in compliance with rule 211, is it?
A. Is it not.

Redirect examination by Mr. AMEY (2):

Q. Is that form A there a form or a rule, Mr. Rourke?
A. It is a note, a form. The note at the bottom of the form explains the manner in which it shall be filled out for the purposes for which it is required.
Q. And what is that?
A. Either as a clearance for orders, or clearance for block or for both, as the conditions may require.
Q. Now, you understand the circumstances existing in this particular case, and I want to ask you if under Rule 91, or 221, or both, and under the form as it has been shown to you, if it was necessary to fill in the blanks, that are not filled in Plaintiff's Ex. R.?
A. Why, the rules don't require that that should be filled in, stating the locations of the trains ahead, under the circumstances to which I have testified.

Recross-examination by Mr. AUSTIN (2):

Q. Will you point out a sentence, or a combination of sentences, under that rule, 221, and the directions or note as you call them, on page 122, that excuses the filling in of those blanks?
A. No, I cannot, but I will explain that. Many of these
493 rules——
Q. Just a minute——

(COURT:) He don't ask for any explanation.
(WITNESS:) I shall have to explain that, it is an ambiguous question.
(W. AUSTIN:) It is not, if the Court please, and he has answered it fully.
(COURT:) He asked you if you iould point it out, and that answers it.

Redirect examination by Mr. AMEY (3):

Q. Now, Mr. Rourke, do you desire to explain your last answer?

(W. AUSTIN:) Well, I object to that question, I would like to have the Court notice the question and answer.
(COURT:) Well, I think if he wants to explain, he may. We don't like to close the mouth of a witness. Of course, we shut him off then because it was a complete answer.

Q. You may explain.
A. In the formation of these rules, they are formed in the affirmative and the negative. A rule may so specify in the affirmative that something must be done.

(COURT:) We hardly think that we should allow that,
494 Mr. Amey, that is an explanation of an inquiry to point out in a rule, that we can't go into a long story about that.

(AMEY:) I would like to have the last question and answer of Mr. Rourke read.

(Question and answer read.)

Q. Now, Mr. Rourke, do these rules stand by themselves, or are they to be construed in connection with other rules?

A. They must be construed in connection with each other.

Q. And do you as an experienced railroad man construe Rule 99 with form A, rule 91, as an explanation of the use of form A?

(W. AUSTIN:) Now, he was examined on direct examination on that point, and cross-examination, and on redirect and on recross.

(COURT:) We shall have to come to an end sometime with this witness, but we will let him answer that question, Mr. Amey.

(Question read.)

A. Certainly do, as regards that part of Form A that refers to the blocking of trains.

Recross-examination by Mr. W. AUSTIN (3):

Q. Point out what sentence says that.

A. I can't neither can I point out the sentence that doesn't say so.

(Mr. W. AUSTIN:) All right.

495 H. J. HAIGUE, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. I would like to have you turn to the work books of December 14, 1911, where the work was done. I will ask you what your business is.

A. Locomotive foreman.

Q. And as locomotive foreman, what are your duties?

A. Had charge of the running repairs in the engine house, to the engines.

Q. When an engine comes in, if there are any repairs required, what does the engineer do?

A. Reports them on the work book.

Q. And is that the work book?

A. Yes, sir.

Q. What is the number of that exhibit, of Plaintiff's Exhibit Z-5? I will ask you if the book which you have in front of you, beginning with page marked "Plaintiff's Exhibit Z-5" is a work book?

A. Yes, sir.

Q. And was that the work book in use in December, 1911?

A. Yes, sir.

Q. Now, sir, does the engineer when he comes in and books work, sign his name to the work required on that engine?
A. Yes, sir, always.
Q. And are the repairs made under your direction?
A. Yes, sir.
Q. Are the men who make the repairs working under your supervision?
A. Yes, sir.
496 Q. I will ask you whether on December 14, 1911, engine 708 was reported for repairs?
A. Yes, sir.
Q. Now, on the opposite page you may look and see if you recognize the signatures of Rogers and La Roe?
A. Yes, sir.
Q. Now, were the repairs required on the 14th day of December, 1911, as follows: "Left main and right front driving brake shoes gone; Left front side rod collar to brass, file little end of main rod, left side; inspect engine underneath"; is that the way it reads?
A. Well, it is left front side rod collar should be "loose," not "brass."
Q. And who is the engineer that booked those repairs on that day?
A. Engineer Preston.
Q. And you may look on the opposite page where you see the signatures of Rogers and La Roe and tell me if those repairs were made. Tell me whether the repairs were made from inspection?
A. Yes, sir.
Q. I wish you would look at that same book for the 16th day of December, 1911, was engine 708 reported for repairs on that day?
A. Yes, sir.
Q. And do you know the signatures of Taylor and Shenette whose names are on the opposite page?
A. Yes, sir.
Q. You may tell the jury if those repairs are made?
497 A. Yes, sir, they were made, according to our records.
Q. Now, you may turn to the 18th of December, you may tell if on December 18 this engine was reported for repairs?
A. Yes, sir.
Q. Do you know the signatures of La Dick, and Olmstead on the opposite page?
A. Yes, sir.
Q. You may look at the opposite page and tell the jury if the repairs were made?
A. Yes, sir.
Q. And who reported the engine for repairs on that day?
A. Engineer Preston.
Q. And was this engine 708 reported for repairs on the 21st of December?
A. Yes, sir.
Q. By whom was it reported on that day?

A. Engineer Preston.
Q. Who made the repairs at that time?
A. Roberts and Rogers.
Q. Were they made?
A. Yes, sir.
Q. Do you find it was reported for repairs on December 30?
A. No.
Q. Is it on the 28th?
A. Not on the 28th.
Q. Look on the 5th of January and see if engine 708 was reported for repairs on that day?
A. Yes, sir.
Q. Who reported her for repairs on that day?
A. Engineer McDonald.
Q. You may look at the opposite page and state if you recognize the signatures of Roberts and Palmer?
498 A. Yes, sir.
Q. You may read what there is there and tell the jury if the repairs recorded were made?
A. Yes, sir.
Q. This is Plaintiff's Z-1, and it is on what day of January?
A. January 7.
Q. Was engine 708 reported for repairs on that day?
A. Yes, sir.
Q. Whose signatures appear upon the opposite page?
A. LaRoe and Roberts.
Q. You may tell the jury if the repairs were made?
A. Yes, sir.
Q. You may look at Jan. 10, Plaintiff's Z-2, and tell the jury if the engine was reported for repairs on that day?
A. Yes, sir.
Q. Who reported her for repairs on that day?
A. Engineer McDonald.
Q. Look at the opposite page, tell the jury if the repairs are made?
A. Yes, sir.
Q. Who made the repairs?
A. Rainey and Palmer.

Cross-examination by Mr. W. AUSTIN:

Q. Are the signatures of the men who you say made the repairs on the book under date of December 21, 1911, are those the signatures of the men who made the repairs?
A. These are the men that made the repairs, but they didn't personally sign their signature-.
499 Q. Well, now, then, what have you been telling us all through this examination?
A. I understood that this was, Did I recognize the men who made the repairs.
Q. Well, that is a different proposition from the signature, isn't it?

A. I guess I probably didn't thoroughly understand that question.

Q. And you don't mean by your direct examination that you have seen signatures of any single man who made repairs?

A. No, sir, they are not the signatures of the men who made the repairs.

Q. Rather peculiar, isn't it?

A. No, that is the system we have always had in force.

Q. Is that so?

A. Always.

Q. You have never taken the signature of the man that made the repairs?

A. The man that makes the repairs, he reports to the foreman and he signs them off.

Q. And what is written down here on the right hand side of the book is pure hearsay, then, is it?

A. No, sir, it isn't.

Q. Well, what is it?

A. The foreman personally superintends the supervision of this work and sees that the work is done, and the slip is handed back to the foreman, who inspects the work and books it off and knows that it is done.

500 All to the foreman?

A. Yes, sir.

Q. Is this in your handwriting?

A. No, sir, it isn't.

Q. Any of it in your handwriting?

A. No, sir.

Q. And neither the man who did the work nor the man who supervised the doing of it made these entries?

A. Well, I don't have to ordinarily supervise, that, we have a foreman on purpose for the work. We have a foreman to supervise that work underneath.

(W. AUSTIN:) I ask to have that stricken out.

Q. Neither the man who did the work nor the man who supervised it made those entries?

A. Well, we have a man to supervise that, and book that work off.

(COURT:) That may be stricken out.

(Question read.)

(COURT:) This inquiry is with reference to who made that entry, if you know.

A. Yes, I understand who made the entry.

(Question read.)

Well, I would like to explain that question.

(COURT:) Well, you can answer it first, and then if there is any explanation. You know whether they did or didn't make it, don't you, and that is really the inquiry?

A. We have a foreman on purpose for looking after that work. There is another foreman under me that personally looks after that work.

501 (COURT:) That don't have anything to do with the question. If you can answer it, you may, by Yes or No.

A. Why, the man who supervised the work made the entry.

Q. Then you did not personally supervise this work?

A. No, sir.

Q. And you can't swear to a single thing that you have testified to so far?

A. Not from personal observation.

Redirect examination by Mr. AMEY:

Q. I want you to explain to the jury your system of making these repairs at the round-house, or in the shops?

(Objected to as not redirect examination, discussion, question admitted.) * * *.

Exception by Plaintiff.

A. Well, the engineer, when he leaves the engine at what we call the coal chutes, he makes an examination of the engine and he books it on one side of the page, at the expiration of his trip, and this work is copied off by the foreman in the round-house, who has the different mechanics execute this work, and the slip is returned to the round-house foreman, and he sees that the work is done, and knows what men done it, and books it off on that book on the opposite page and signs the men's name- on and

502 he personally knows that this work is done, before he books it off,—is right out by the engine all the time that the engine is in the shop.

Q. Now, you have taken charge down there?

A. Yes, sir.

Recross-examination by Mr. W. AUSTIN:

Q. Whose handwriting is that Plaintiff's Z-6 on that side?

A. Engineer Hebard.

Q. Is that his signature?

A. Yes, sir, that is his signature.

(W. AUSTIN:) I would like to read this to the jury. "December 16, examine flues and grates, intercepting valves stick badly, pack air pump, leaking bad; pack right valve stem, leaking, blowing bad; inspect engine underneath; one bolt gone on pony truck right side; Hebard."

503 RUDOLPH VALLEE, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. I am showing you the work-book of the Central Vermont Railway at St. Albans, used in booking repairs on engines from

December 12, 1911, to December 24, 1912. I think there are papers in there where—to which I wish to call your attention. The first one is December 14. I will ask you if you were employed at that time by the Central Vermont Railway Company?

A. Yes, sir.

Q. And doing what work, Mr. Vallee?

A. Night foreman.

Q. As night foreman, did you have charge of the repairs on engines?

A. At night.

Q. Now, on that day you will notice that engine 708 was reported for repairs, do you?

A. Yes, sir.

Q. And you see the signature to that report for repairs?

A. Yes, sir.

Q. Were you in charge at that time?

A. Yes, sir.

Q. And did you sign the names on the opposite page, of the men who made the repairs?

A. Yes, sir.

Q. You may tell the jury whether these men reported to you?

A. The work they have done, you mean?

Q. Yes.

A. Well, we give the work to the men, which is booked on the engine, and if they don't do the work, they report us the work that is not done. That is the way we do nights, and what
504 they don't report, we book it off.

Q. Did you have charge of it?

A. Yes, sir.

Q. Do you see that it is done?

A. Yes, sir, as much as I can.

Q. You go around among the men when they are doing it?

A. Yes, sir, stay with them all the time.

Q. And it is your business is it to watch the engine and see that the repairs are made?

A. Yes, sir.

Q. And it was at that time?

A. Yes, sir.

Q. Now, I want you to read what is on the left with reference to 708 on the 14th of December, 1911?

A. "Left main and right front driving brake shoe gone; left front side rod collar loose; file little end of left main rod; inspect engine underneath.' '

Q. Now, you may look on the right-hand side and tell the jury if those repairs are made and what was done?

A. "Brake shoe was put on by Rogers; side rod collar tightened and left little end reduced, LaRoe."

Q. Were those the required repairs?

A. Yes, sir, they was all.

Q. On the 16th the repairs were booked out by Mr. Corrigan?

A. Yes, sir.
Q. And is he in the service still?
A. Yes, sir.
505 Q. Now, on the 18th of December?
A. That is from Heath.
Q. Is Mr. Heath in the service?
A. No, sir, I don't think so.
Q. So you can't testify about the 18th of December?
A. No.

(AMEY:) I desire to introduce in evidence the pages which have been identified by the witness.
(W. AUSTIN:) Well, do you mean anything more than the one he has testified about, which is Dec. 14?
(AMEY:) Yes.
(W. AUSTIN:) Well, it may be received.
(COURT:) It is received in connection with the witness' testimony.
(Deft. Ex. 4.)

Q. I show you the book denoting the repair reports of engineers for engines on the Central Vermont Railway from January 4, 1912, to January 17, 1912, and I call your attention to that part marked "Plaintiff's Z" and ask you if engine 708 was reported for repairs on that day?
A. Yes, sir.
Q. That is on what day?
A. January 5.
Q. And you may look on the opposite page and see if those repairs were made under your direction?
A. Yes, sir.
Q. And you may read the repairs that were made?
A. "Tubes caulked, stay-bolts caulked, key-bolts put in key-block, middle joint gasket put in over-pass valve, right valve
506 stem stightened, left big end key pulled down."
Q. Were the requisite repairs made upon that engine that day?
A. Yes, sir, according to the reports.
Q. I show you Plaintiff's Z-1 and ask you if engine 708 was reported for repairs on the 7th day of January, 1912?
A. Yes, sir.
Q. And you may look on the opposite page and see if those repairs were made under your supervision?
A. Yes, sir.
Q. What repairs were made, you may tell the jury?
A. Overpass valve head joint made, right back cylinder cock applied; right valve stem packed; cross-over pipe repaired; left big end key, grates chipped, and flues cleaned.
Q. I show you Plaintiff's Z-2 and ask you if this engine was reported for repairs on the 10th of January, 1912.
A. Yes, sir.

Q. You may look on the opposite page and see if those repairs were made under your supervision.

A. Only a couple, only two little jobs wasn't done on her.

Q. Well, what was it?

A. Stay up left main wedge, that ain't done, and stay-bolts caulked, that wa'n't done.

Q. On the 12th of January?

A. 12th of January.

(W. AUSTIN:) You mean 10th, don't you?

507 A. On this date, the 10th.

Q. Why wasn't that done, the balance of it?

A. Well, those jobs, we weren't very particular about, the jobs like that sometimes, that job isn't very particular, left main wedge—can't do it all.

Cross-examination by Mr. W. AUSTIN:

Q. When an engine is reported in, "Pack right valve stem," that indicates that she is leaking at the right valve stem, don't it?

A. Yes, sir.

Q. Leaking steam?

A. Yes, sir.

Q. Now, the life of a packing, the ordinary life of a packing is about a year, isn't it?

A. Last that long?

Q. Yes.

A. Sometimes it does, and sometimes it doesn't.

Q. From shop to shop, is that not so?

A. Not that I know.

Q. You don't know?

A. I never seen it last that long.

Q. Now, if you had repeated notice to pack right valve stem, do you consider it your duty as foreman to examine that right valve stem and see what the trouble is?

A. Yes, sir.

Q. And it is an indication of trouble, isn't it, to have the right valve stem reported for packing every trip an engine makes for a week?

A. Yes, sir.

Q. That indicates that there is something the matter with the stem itself, doesn't it?

508 A. Well, sometime.

Q. That indicates that the stem needs turning, doesn't it, that the right valve stem needs turning?

A. I don't get that last word.

Q. Turning in a lathe?

A. Oh, yes, well, sometime it does, sometime it doesn't.

Q. And in this particular case with this engine, you finally got notice after the wreck occurred as soon as the engine got in, to do expressly that thing, turn the right valve stem, didn't you?

A. I didn't notice the work after she come in.
Q. Turn to January 13, read that sentence.
A. "Turn right valve stem so it will not leak."

509 E. E. CORRIGAN, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. What is your business?
A. Supervisor of work in the round-house.
Q. Supervisor of repairs?
A. Yes, sir.
Q. And you have the same duties to perform that Mr. Vallee has?
A. Yes, sir, practically the same, yes, sir.
Q. Just the same?
A. Just the same, yes, sir.
Q. I show you Plaintiff's Ex. Z-6 and ask you if engine 708 was reported for repairs on the 16th day of December, 1912?
A. It was, yes, sir.
Q. And did you supervise those repairs?
A. Yes, sir.
Q. You may tell the jury what the repairs were?
A. Examine flues and grates, clean and oil intercepting valve, pack right valve stem, put in pony truck, job work.
Q. Were the required repairs made upon that day?
A. Yes, sir.

(AMEY:) I would like to introduce that in connection with the cross-examination, that page.
(W. AUSTIN:) No objection.
(COURT:) It may be received. (Deft's. Ex. 5.)
(AMEY:) I would also like to introduce the repairs made on Jan. 5, Jan. 7 and Jan 10, in connection with the examination of Mr. Vallee.

(COURT:) Any objection?
510 (W. AUSTIN:) No, if he means he would like to introduce those pages of the book.
(AMEY:) Yes, those pages of the book.
(W. AUSTIN:) We have no objection.
(COURT:) They may be received.

JAMES E. FITZSIMONS, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. I show you, Mr. Fitzsimons, a piece of machinery and ask you what it is.
A. A model of a locomotive.
Q. What parts of a locomotive does that show?
A. Shows the cylinders, valves, valve stem, piston, cross-heads, main rod, one driving wheel and the entire main work of one side of an engine.

Q. What is your business?
A. Master mechanic of the Central Vermont.
Q. How long have you been Master Mechanic?
A. Since February 1.
Q. And prior to that time what positions have you held?
A. Acting Superintendent of Motive Power and Traveling Engineer, Locomotive Engineer and Fireman.
Q. How long were you in the service as Locomotive Engineer?
A. About eighteen years.
511 Q. And have you always been in the service of the Central Vermont Railway Company?
A. I have since I commenced.
Q. When did you cease your occupation as Locomotive Engineer for this company?
A. About nine years ago.
Q. After you ceased your occupation as Locomotive Engineer what did you do?
A. Traveling Engineer.
Q. And as Traveling Engineer, what were your duties?
A. My duties were to travel around on the engines to see that they were performing their duties, their work, satisfactory.
Q. Is it the duty of a Traveling Engineer when anything is the matter with an engine to call it to the attention of a Locomotive Engineer?
A. It is.
Q. And was that a part of your duties?
A. It was at that time.
Q. Do you have Traveling Engineers on the road now?
A. We have.
Q. How many have you?
A. We have one.
Q. And does he perform now the same duties that you performed then?
A. He does.
Q. Now, you may state a little more in detail what the Traveling Engineer has to do.
A. Well, he has many duties to perform.
Q. Well, tell them to the jury.
512 A. He is supposed to ride around on all the engines and see that they are performing their duties properly, and if they are not, report it to the Superintendent of Motive Power, and see that they are put in condition to do it.
Q. And your Traveling Engineer on the Central Vermont now has what territory?
A. The entire system.
Q. And does he ride on the engines, on the locomotives?
A. He does.
Q. To observe how the locomotives are working?
A. Yes.
Q. And whether or not if there is any difficulty with a particular engine he calls it to the attention of the locomotive engineer?

(W. AUSTIN:) I suppose he means by that whether it is his duty to do that.

A. Yes, it is his duty.

Q. Now, sir, after you were Traveling Engineer, you became Locomotive Foreman?

A. No, sir.

Q. Oh, excuse me, Acting Superintendent of Motive Power?

A. Yes, sir.

Q. As Acting Superintendent of Motive Power, what were your duties?

A. General supervision of Mechanical Department.

Q. Of the Mechanical Department, and explain more in detail what you would have to do?

513 A. Well, I had entire charge of the Machine Shop and all men on the road, all the engineers and firemen, and their time was all kept in the office, and any irregularities, why, it was our duty to see that it was corrected.

Q. Then, what do you mean by irregularities?

A. Well, anything that might come up that wasn't in the regular course of the workings of the system.

Q. Does a locomotive Foreman or a Master Mechanic have to understand the construction of a locomotive?

A. He does.

Q. Have you, in your capacities, taken charge of examinations of engineers?

A. I have.

Q. And whether that is part of your duty now?

A. It is.

Q. What do you mean by that, explain to the jury?

A. Well, we have an examination book that they have to fill out, and it is our duty to see that they fill them out proper, and that they are competent men, before we allow them to assume the duties of an engineer.

Q. And is that done in the promotion of men from the position of fireman to that of engineer?

A. It is.

Q. Now, sir, I would like to have you explain your system of keeping the engines in repair?

A. Commence with an engine just come from the shop?

Q. Yes.

514 A. Well, we have a new engine come from the shop a Traveling Engineer's duty usually is to ride that engine the first trip if he can, and see if there is anything wrong with it, and if it is performing its duty properly, and then the engines come in, and if there is anything booked on them, which there always is, they see that the work is done.

Q. How often are engines sent out, sent to the shops for general repairs, general overhauling?

A. That depends upon the work they have done, the mileage they have made and work done, and condition they are in.

Q. Does that depend at all upon the loads they have to carry?
A. A great deal.
Q. And whether or not repairs have to be made more frequent or less frequent in cold weather, in the winter-time?
A. More frequent.
Q. And whether it is anything extraordinary for an engine to be reported once a week or two or three times a week, or once a month, how often?
A. Well, they are reported every trip, something on them. If a man running an engine, we would think there — something happened, if he didn't report some work on his engine when he come in.
Q. I wish you would explain, before we go any further, this model. Take it down where the jury can see it and explain the model to the jury. I wish you would show the jury where
515 the steam passes from the boiler into the cylinder.
A. There is what we call a steam chest, and that sets right on top here, that contains the steam, that is, as it comes from the boiler, when the throttle is open, and as the steam is admitted—this is only one side of an engine—it is supposed, the opposite side is just the same, and every time this moves here, it opens this port here, the steam comes right down through there into the cylinder. As the engine gets the full stroke, it goes half way past—it changes when it just gets about this point here—there is what they call the exhaust port right underneath here, and right up through the bottom of the valve and out here.
Q. Now, when this moves clear back here that indicates that this part in here (indicating) is filled with steam, don't it?
A. Yes.
Q. It is the steam pressure that drives it back?
A. That works it altogether.
Q. It is the steam pressure that drives it back?
A. Yes, sir.
Q. Now, when it is driven clear back, clear back there to this end, what happens then, how does the steam get in on the other side to drive it back the other way?
A. We have another engine on the other side just the same as this one that you see, and when it is clear to the end there,
516 the other side is doing the same on the other end. It starts it back and brings it by the admission port.
Q. Now, what do you call that, the cylinder head?
A. That is what we call the piston head.
Q. When the piston head is clear back, where does the steam get into the cylinder to force it back?
A. Gets right in here where you see this white.
Q. That is when it is coming back this way, isn't it? Goes in there—what is this white mark nearest the large wheel called?
A. That is the admission port.
Q. Precisely. So that the steam is admitted from two places, isn't it?
A. Yes, sir.

Q. Now, when the cylinder head, or the piston head, goes back this way, the steam is admitted from the side farthest from the big wheel?

A. Yes, sir.

Q. And it keeps on getting admitted until the piston head gets right back against the cylinder head, isn't it?

(Objected to as leading).

Q. Now, sir, where does the steam come in when this piston head is going back?

A. Comes in here, indicating.

Q. What is the object of this lever on the top?

A. That is what cuts off the admission of steam.

Q. Is that the mechanism that shifts the admission of
517 steam from one end of the cylinder head to the other?

A. It is, with the eccentrics.

Q. Now, we have heard about steam escaping from around the pistons, and you may tell the jury, explain to the jury, where it does escape around the pistons?

A. Right around here, (indicating).

Q. Now, I wish you would get up the packing-box we had here. (Packing-box produced) Is that like the one we had here before?

A. No, the other was a piston, this is a valve-stem packing.

Q. Where is the valve stem, so to speak?

A. Runs right through this spring. This is the outer side. This goes right onto the steam chest. There is two sets that is in the steam chest, comes out through here, and there is two nuts that goes on.

Q. Where is that attached to the engine? Show the jury by this model?

A. Well, there isn't a steam chest on that one. It is supposed to be a box right around here, and we call a steam chest that the steam is confined in before it enters into the cylinder, and this box is put around here for the purpose of keeping the steam there, as the valve goes back and forth.

Q. And that valve stem is a part of the steam chest?

A. No, it isn't termed as that, it is termed as the valve
518 stem, but it goes into the steam chest, goes through. It is what makes the connection into the steam chest. That is to make it as tight as can be made around it.

Q. What is that spring for you have there?

A. That is to keep the packing compressed all the time so that it will stay tight, the packing is just inside the box.

Q. Was that the contrivance you had on engine 708 on the night of January 12, 1912, at the time of this accident?

A. It was.

Q. And when that is reported out of repair, what do you do to it?

A. Just take off those two nuts there, this part stays on all the time, this will slide right back on that stem (indicating); this is what we call a packing cup, and those are what we call the packing.

Those three rings are put right in there so it makes a tight fit, as tight as can be made, and the compression of that spring holds that packing in place at all times. That slides right back, and all the man has to do is to put this right in to that new box, shove the box up and tighten it.

Q. When the steam leaks out of the valve stem, where does it come from?

A. Comes from the steam chest.

Q. And that is inside, is that inside the steam chest?

A. Well, the steam is inside the steam chest.

Q. And that is where with reference to the steam chest?

519 A. It is right on the outside, this valve rod runs right through them.

Q. And does that have anything to do about letting the steam from the boiler into the cylinder?

A. It does.

Q. Well, now, you may explain to the jury what that has to do in that respect?

A. This makes a steam-tight joint, or as near as can be made, for that valve rod to work back and forth through there.

Q. And you may tell me if that is on top?

A. Yes, right on that little valve stem just like that (indicating).

Q. And it has to do with letting the steam—does it have to do with letting the steam through these passageways into the cylinder head?

A. Nothing to do with that.

Q. What does it have to do with?

A. It makes the joint for this rod to work through.

Q. And the rod is the rod on top of this (indicating)?

A. That is the rod.

Q. And the motion of the rod back and forth, you may state whether it allows the steam to go into the cylinder head?

A. It does.

Q. Is that, Mr. Fitzsimons, the most approved valve stem?

A. It is.

Q. And is there anything, or has there been anything, up to the present time devised, that will keep one of those valve stems

520 perfectly tight?

A. Not that I know of.

Q. And whether or not, as the fact, in the operation of an engine, it is anything extraordinary for steam to leak out through there?

A. It is not.

Q. And was that true on the 12th of January, 1912?

A. It was.

Q. Now, I would like to have you tell the jury, Mr. Fitzsimons, where elsewhere from an engine steam escapes normally?

A. Through the smokestack and the relief valves or pop valves, as we term it.

Q. From your experience as an engineer, you may tell the jury whether a small amount of steam makes a greater show on a cold night?

A. It does.
Q. You have spoken, I believe, about the pop valves.
A. Yes, sir.
Q. What are they, Mr. Fitzsimons?
A. They are to relieve the boiler, when the pressure is up to the maximum, whatever it is set at, they will relieve the steam through the pops.
Q. When you stop an engine on the road, is there condensation of steam in the water?
A. I don't know as I just understand that question.
Q. Condensation in the cylinders?
A. There is.
Q. Now, if there is condensation in the cylinders, how is that relieved?
A. By opening the cylinder cocks.
521 Q. And does that produce steam?
A. It does.
Q. If steam did not escape from an engine, could you run an engine on the road?
A. I don't know how you could.
Q. Is it possible in the operation of engines on the road, with the traffic conditions as they existed on January 12, or thereabouts 1912, on the Central Vermont Railway, to keep engines in repair so that steam would not leak anywhere at any time?
A. It wouldn't.
Q. Now, there were, as I understand, some repairs reported on this engine, were there, at different times?
A. There was.
Q. And you have heard the records, were you here when the records were being read this afternoon?
A. I was.
Q. Now, on December 14, 1911, it says here in the report for repairs by Preston, "Left main and right front driving brake shoes gone." That have anything to do with the escaping of steam from an engine?
A. No, sir.
Q. You may tell the jury what that is?
A. It is a shoe that goes on the brake heads, and sometimes they get wore out, or they might lose them off on the road, for the purpose of breaking the train, engine.
Q. "Left front side rod collar gone," what is that?
A. That is a collar to one of the side rods.
Q. And "File little end of main rod, left side," what is that?
A. Well, that is one of the main rods, or the side rods
522 that the brasses want reducing, they are a little large for the pin.
Q. And on December 16, 1911, "Examine flues and grates, intercepting valves sticking badly," what is the intercepting valve?
A. Well, that is the valve in the cylinder for the purpose of working the engine, simple or compound.
Q. What would cause that to stick?

A. Get a little dry.

Q. And it says, "Examine flues and grates," where are they and what are they?

A. The grates are in the fire-box, that is, just like they would be in any furnace, and the flues are, go through the boiler, there is where the smoke goes out and heat.

Q. "Pack air pump, leaking bad," where is the air pump?

A. That is on the outside of the boiler, that is for the purpose of compressing the air to brake the train.

Q. Does that have anything to do with steam?

A. No, sir.

Q. "Pack right valve stem, leaking very bad," what is meant by that?

A. Well, it means that this packing here probably is a little leaky.

Q. What do you do to make those repairs?

A. They put in a set of this packing.

Q. Jan. 18, "Face front by-pass head so it won't leak," where is the by-pass head?

A. It is on a low-pressure cylinder.

523 Q. And what is that for?

A. Well, it is for the purpose—there is two valves that when the engine is drifting allows the cold air to drift from one end of the cylinder to the other, and this head is for the purpose of keeping those valves in their place.

Q. Is it anything unusual for the flues to leak?

A. No.

Q. What, Mr. Fitzsimons, causes the flues to leak?

A. Expansion and contraction.

Q. And in cold weather would there be contraction?

A. A great deal more than in warm weather, expansion.

Q. And would the contraction increase as the cold increased?

A. It does.

Q. So that there might be considerable contraction on a very cold night, is that true?

A. It is true.

Q. Is there any way to prevent that?

A. Well, it depends a great deal on the way they are used. If they have a professional fireman and the engineer handles them good they don't have so much trouble with them.

Q. Does the same principle apply that applies to a steel rail when it contracts in the winter time and expands in the summer time?

A. A great deal that way.

Q. And that is a principle of natural philosophy, isn't it?

A. That the rails will expand out. These expand this way, (indicating) contract, being hollow.

Q. "File little end of main rod" on December 14, "left side". Did that have anything to do with leaking of steam?

524 A. No, sir.

Q. On December 16, "One bolt gone on pony-truck right side," did that have anything to do with leaking of steam?

A. No, sir.

Q. On December 18, "Face front by-pass head so it won't leak". Does steam leak from there?

A. It does.

Q. And on Jan. 5, 1912, "Caulk the tubes," what is that?

A. Well, that is expand the tubes.

Q. What are those tubes?

A. They go through the boiler and carry the smoke and heat through there to the stack.

Q. Are those inside the boiler?

A. They are.

Q. Does that have anything to do with escaping steam?

A. Not outside.

Q. "Put in two new key bolts in left middle joint brasses", what is that?

Q. Well, that is the middle joint brasses. They wanted some key bolts in.

Q. Where are the key bolts in?

A. They go down through the keys that is in the side rod, the key bolts.

Q. "Put gasket in front over-pass". What is that?

A. Well, that is the over-pass head, should be.

Q. On Jan. 7 it says "Put asbestos gasket in right front over-pass head." What is that?

A. Well, that is the same thing.

Q. Is it anything extraordinary for those to get out of repair?

A. No, sir.

Q. "Put down key in left big engine", what does that mean?

A. It means key the left big engine.

525 Q. What is that?

A. Well, that is where it connects onto the main pin.

Q. Main what?

A. Main cock pin.

Q. Is that where steam escapes?

A. No, sir.

Q. "Fix grates so they can be opened both front sections". Does that have anything to do with escaping steam?

A. No, sir.

Q. Now on January 10,—how long was that before the accident—the day before the accident, "Reduce left big end brasses and key up same", Also "set up left main wedge". What are those repairs?

A. Well, the big end brasses, he asked to have them reduced. They were probably a little large for the pin, and he wants them keyed if they are reduced; and the wedge is what goes up back of the box, and perhaps he thinks it is a little slack, he wants it pushed up a little more.

Q. Is that an instrument of steam escape?

A. No, sir.

Q. "Tighten left eccentric", what is that?

A. That is one of those that are on that main journal that moves the piston back and forth, valve stem rather.

Q. Is that anything to do with escaping steam?
A. No, sir.
Q. Now "Clean train line governor", what is that?
A. That is the governor of the train line, that is the air line.
Q. The air line?
A. Yes, sir.
Q. That has nothing to do with the steam chest?
A. No, sir. That is an air pipe.

526 Q. Now it says, "Pack right valve stem. Put arch in engine, Also caulk tubes". What does that mean?

A. Well, you have an arch in all fire boxes and he asked for an arch to be put in; and the tubes are those—probably were leaking a little, have them expanded so to tighten them up so they won't leak.
Q. "Dry and caulk staybolts on both sides of fire box". Where are those?
A. They are right along the side of the fire box.
Q. Does steam come out of those when they are not caulked?
A. They do sometimes.
Q. And a great quantity of steam?
A. Not unless they are broke.
Q. And whether or not in your experience as an engineer and a mechanic, good engines sometimes are in that condition?
A. Yes, sir.
Q. Is there any way to prevent that?
A. I don't know of any way.
Q. Is there any way to obviate the breaking of cylinder cocks sometimes.
A. There is no way that I know of. In the wintertime we break them off very often.
Q. And is it anything extraordinary or is it something normal and usual for engines to be reported for repairs every trip and is that the result of the normal operation of a normal engine?
A. It is.
Q. I don't think I have asked you, Mr. Fitzsimons, about your system of making repairs. Now you have been in charge of that department, haven't you?
A. Yes, sir.

527 Q. I wish you would explain to the jury fully your system of booking and making repairs on defective engines when they come in?

(W. AUSTIN:) Why, do you intend to show it different than you have shown it?
(AMEY:) Well, I think it is proper to have some accumulative evidence on that.
(COURT:) How will that aid anything, Mr. Amey, in the case. Of course if it don't, why we don't——
(AMEY:) I propose to shorten my testimony as far as is possible, but inasmuch as we have been attacked upon that point I would like to ask him two or three questions about it.
(COURT:) Upon what point have you been attacked?

(AMEY:) Upon the point of not properly taking care of our engines.

(COURT:) Well, anything that bears upon that question we don't exclude, but this question, I understand, that is pending is with reference to how they conduct their business generally, and you asked him to go into it fully. We don't know how much time that will take. If it will aid any we want to let it in. If it won't we would like to keep it out.

(AMEY:) I have the thing in my mind in a particular way, I may be wrong, that if our system of reporting and making repairs of engines is a proper system, then to that extent evidence of
528 that sort of thing would be in our favor.

(COURT:) Well, I don't think they can charge you with that because they haven't charged you with that in the declaration, which I have been running over somewhat. They charge you only in the particulars which they state in their declaration, and of course, we shall confine them, and shall submit the case within the allegations of their declaration. Now, why I asked this question is because I can't see how it would aid the jury at all upon any question that is involved in this case.

(AMEY:) Well, in view of the opinion of the Court I won't ask it, ask that question.

Q. Now these repairs to which I have called your attention, you may state, Mr. Fitzsimons, if they are ordinary repairs on an engine?

A. They are.

Q. Whether in all this catalogue there has been any serious defect shown?

A. There has not that I have seen.

Q. And is that something that frequently occurs with any engine on the road, those repairs?

A. They are.

Q. When was this engine overhauled?

A. Nov. 30, 1911.

Q. Now, sir, you may state to the jury to what extent repairs were made upon this engine at that time?

A. General repairs.

Q. What do you mean by an overhauling of an engine?

A. We mean they rae practically as new when they come out of the shop, they are practically the same as new.

529 Q. That is, before they go in or when they come out?

A. When they come out.

Q. How frequently are engines overhauled as a rule, operating on the Central Vermont?

A. It depends upon the mileage and the work that the engine has been doing.

Q. What do you say about the mileage, how much mileage will an engine make without general overhauling?

A. Well, from seventy-five to a hundred thousand miles. We have had them go as high as one hundred and fifty.

Q. You may tell the jury if this engine was equipped with the best known appliances?

A. It was.

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Q. You may tell the jury whether engines are liable to leak after they first come out of the shop and are in a good state of repair, and if so why?

A. They are liable to leak when they first come out of the shop. Many times in turning up those different parts there might be a little roughness which would wear away in a very short time, left from the tool.

Q. You have reference to scratches or tool marks on the parts?

A. I have.

Q. You may tell the jury if this particular engine was subject to government inspection?

A. She was.

Q. Can you tell the jury if she was inspected by government officials?

A. Well, I can't say that she positively was but if anything had been wrong——

530 Q. Don't tell what you don't know, Mr. Fitzsimons, but I want you to tell the jury the necessity of government inspection of your engines?

(Objected to. Question excluded.)

Exception by defendant.

(AMEY:) We would like to show that under the Federal Law these engines all are frequently inspected, and that this among the others was inspected prior to the time when it was used on this occasion.

(COURT:) Well, we will adhere to our ruling, an exception may be noted.

Exception by defendant.

Cross-examination by Mr. AUSTIN:

Q. It is largely a question of economy, is it not, when an engine shall be sent to the shop for repairs instead of being repaired at the round-house?

A. I don't know as I just understand your question, Mr. Austin.

Q. A railroad company always takes into consideration the question of cost, does it not, in determining whether to send an engine to the shops for repairs instead of repairing in the round house?

A. I don't know as I quite understand the question now, Mr. Austin.

Q. Now, in a normal engine where does the steam escape?

A. Well, there is several places where it can escape under different conditions.

531 A. That isn't my question.

A. Under what conditions, Mr. Austin—when they are working or when they are standing?

Q. Yes, when they are working?

A. Do you want I should point out to the jury.

Q. Yes, if you please.

A. It escapes at the smokestack, one place, and at the pop valves, and the whistle, when they blow the whistle, and many other—if there is any place where there is any movement of the parts through the steam, it will escape more or less; and the cylinder cocks, and saddle cocks when they are open.

Q. And the manufacture of an engine involves, does it not, the use of parts that are strong enough and well enough fitted so that steam will not escape except at the will of the person who is running the engine?

A. They have never been able to yet.

Q. Well, take piston packings—how about those? Haven't they been able to make a piston packing that would prevent steam leaking from around the pistons?

A. Not entirely.

Q. Isn't it one of the rules of good manufacture, of safe manufacture that the packing around the piston rod shall be secure to prevent steam leaking?

A. As secure as possible.

Q. Well, isn't it this much secure—that the piston must be steam tight?

A. It has never been known to be made that way yet in my experience.

Q. I suppose you have read authorities?

A. I have.

Q. Upon steam engines?

A. I have.

532 Q. And don't you know that it is a familiar principle of the manufacture of engines that the piston must be steam tight—it is prevented from leaking at the sides by metal packing?

A. I will answer that—by my own experience I have never seen one yet.

Q. Just answer the question. The question is limited to your knowledge of the authorities upon that subject?

A. I think I am pretty good authority myself in eighteen years' experience in handing one.

Q. You think you are better authority than the author of publications on this subject?

A. Those people are selling engines.

Q. Then you want to say Yes to that question, do you?

A. I think I am just as good.

Q. Now, you say that you can't run an engine without steam escaping. I want to know if you could run an engine if all the steam escaped?

A. You could not.

Q. Then there must be some point, isn't there, between an engine that leakes no steam except from places that were made to leak steam, and an engine that leaked so much steam from places that it was not intended to leak steam, where that engine is wholly improper to run?

(PALMER:) That is objected to as assuming something that doesn't appear in this case at all—nowhere appears in the
533 evidence that any such condition existed with reference to any engine involved in this case; and the question is incompetent and improper.

(COURT:) I should hardly dare to exclude it. It is a question on cross-examination, and it may have a bearing on the weight that will be given to this witness as an expert. I think we will allow the question.

Exception by defendant.

(Ques. read.)

A. I don't know as I quite understand that question now.

Q. I will ask another. Would you say that it was proper to run any engine that would pull its load regardless of any other circumstances?

A. I would not.

Q. No. You wouldn't say that it was proper to run an engine which had built out around its sides a barrier that would absolutely prevent any person on that engine in operation of it, looking ahead of it, would you?

(PALMER:) That is objected to as incompetent and presenting questions that aren't involved in this case, and a question assuming something that has not been shown at all in connection with evidence as to the condition of the engines.

(COURT:) Well, as bearing upon the weight to be given to the witness' testimony we will receive —, as an expert.

Exception by defendant.

534 (Ques. read.)

A. What kind of a barrier do you mean, Mr. Austin?

A. Well, any barrier that would prevent vision ahead of the engine on the track?

A. I have never seen any that way.

Q. Now if you will answer the question.

A. If I had ever seen one built that way I could answer the question.

Q. Well, assume you never did—I will ask you if it would be proper to run an engine in that condition?

A. I should say not, if there was something built up of that kind?

Q. If an engineer were able to do it, still you wouldn't consider it proper, would you, for him to run an engine blindfolded?

(PALMER:) That question is objected to for the same reasons stated to the other.

(COURT:) It may be received and exception noted.

Exception by defendant.

(Ques. read.)

A. I would not.

Q. Now what is the normal life of one of these metallic packings?

A. Well, circumstances alters the case a great deal.

Q. Well, I am seeking about the normal life?
A. That is something that no man can determine without knowing the care that it gets.
Q. Well, you testified in the case of Niles vs. the Central Vt. Ry. Co. at this term of Court, didn't you?
A. I did.
535 Q. About these packings? And in that case didn't you testify that the normal life of these packings was from shop to shop?
A. That is a different packing from what we are using here.
Q. I am talking about piston packings now?
A. Well, they are a different make of packing, that other one was.
Q. You used a different piston packing on this engine than you did on the one in the Niles case, did you?
A. We do.
Q. How different?
A. Well, it is a little different make.
Q. Well, let's know what that is?
A. You saw the other packing?
Q. Yes. I am not talking about that packing there, (indicating) that is a valve steam packing, isn't it?
A. Yes.
Q. I am talking about a piston packing?
A. They are practically of the same material.
Q. Practically the same material?
A. That is, the metallic packing.
Q. Now do you say you used a different one on this engine?
A. Used a different one from the one that was on the other one.
Q. Well, answer my question. I don't care what this is. Did you use a different piston packing on that engine 708 than you did on the engine you were talking about in the Niles case?
A. We did.
Q. What was the difference?
A. Different make.
Q. Well, that isn't instructive. What is the difference?
A. Well, it is a different patent, a different man's make, and a different patent on it.
536 (COURT:) He asks you what the difference is?
A. Well, it is in the make-up of it, it is a different shape.
(W. AUSTIN:) Well, tell us what it was, what was the difference?
A. Just in the shape of the packing, that is all, the shape of the make-up.
Q. Well, what was the difference?
A. Well, the other is a different pattern, a different make and different pattern.
(COURT:) He wants to know what is the difference in the make?
A. I couldn't explain that, sir, so you would understand it unless I had the other packing here.

(W. AUSTIN:)

Q. Well, maybe you can, go ahead, we will see if we understand you?

A. There is one ring used in the other and there is three in this one, for one. That is about the only difference, and the shape is a little different.

Q. And in this case the three rings are supposed to be more efficient than the one ring in that case?

A. No, sir.

Q. The efficiency is supposed to be the same, is it?

A. Well, it is considered so.

Q. And of what is the material?

A. The material is practically the same.

Q. Practically the same material, a metallic substance?

A. Yes.

Q. Mixture of what?

A. Well, I couldn't give you the combination just now, what it is made of. We have it, a formula.

537 Q. The only difference then is, that in the case you were talking about before, there was one ring, in this engine there were three, is that true?

A. And shape a little different.

Q. Well, now, tell us what the difference in shape was?

A. It would be impossible to give you an idea without getting the shape of the other here so you could determine.

Q. Well, then, there wasn't difference enough between them so that you can tell us what it was in shape?

A. Only the one ring and the three rings.

Q. That is the only difference. Well, now, then, in the Niles case you testified that the normal life of that packing was from shop to shop, didn't you?

A. I don't recall just exactly what I said, but with proper care it will last from shop to shop.

Q. Yes,—and you say that now, don't you?

A. I do.

Q. And that applies to this kind of a packing that was on 708 the same as it does on any other engine?

A. It does if it gets proper care.

Q. Now in the case of a valve stem packing, what difference is there between a valve stem packing and a piston packing?

A. In what way, Mr. Austin?

Q. In any way that you know of?

A. There is practically no difference, except in the size of the rings and the size of the box.

Q. Now, then, in the piston packing you have the movement of a larger object through the orifice, have you not?

538 A. I have.

Q. Then you have a larger bearing and wearing surface, have you not?

A. I have.

Q. A more difficult orifice to plug?

A. Not necessarily.

Q. You have in the case of a piston, pressure of the energy coming in to the cylinder and moving the piston, do you not?

A. I have.

Q. And you have the countervailing pressure of work on those drivers, do you not?

A. I do.

Q. That is all communicated by this piston that moves through that orifice, isn't it?

A. Yes.

Q. But in the case of the valve stem you don't have any such work as that working through the orifice, do you?

A. You do.

Q. All you have is movement of that slide valve, is it not?

A. And the pressure as well.

Q. Does the valve stem work the wheels of the engine?

A. It does not.

Q. What is the function of the valve stem?

A. It is to move the valve to admit and exhaust the steam out of the cylinder.

Q. And that is all it does, isn't it?

A. It has the pressure of all that steam on top of it.

Q. You mean the valve has the pressure of the steam on top of it?

A. It does.

Q. But the valve stem does not, does it?

A. But is has that function to perform.

539 Q. Now this valve sets on a smooth oiled surface, does it not?

A. Supposed to.

Q. And it is perfectly level, isn't it, supposed to be?

A. Supposed to be.

Q. And all the parts of the valve should fit correctly the parts of that surface?

A. They should.

Q. And all this valve stem does is to move with the rockerarm and slide that valve on that surface, doesn't it?

A. That is a part of its duty.

Q. Again. In the case of the piston this rotary movement made by the drivers,—I suppose you call it the main rod, Don't you, attached to a block crosshead, I think you call it, don't you.

A. Yes, sir.

Q. May be communicated to that piston if this crosshead and the grooves in which it slides get worn or moved, or for any other reason do not work perfectly?

A. I don't know as I catch your idea.

(Ques. read.)

A. That is quite a complicated question.

Q. You can't answer it, can you?

(PALMER:) He says he can't comprehend the question, and

there can't anyone else. I object to counsel's assuming he can't answer the question.

(COURT:) Well, an exception may be noted.

(W. AUSTIN:) If Judge Palmer speaks for the witness I will accept that, that he can't understand that question.

540 (PALMER:) I except to that statement of counsel. The witness himself said that he didn't understand the question, and I would like an exception to the remark of counsel.

(W. AUSTIN:) Well, I accept that.

(COURT:) Well, that may be noted, an exception may be noted. Proceed.

Exception by Defendant.

Q. But in the case of the valve stem there is no rotary movement that can be communicated to it, is there?

A. There is just as much rotary movement as there is to the piston.

Q. The valve stem is connected to the moving part of the engine by the upper end of the rockerarm, is it?

A. Yes, sir.

Q. And every movement of that rockerarm pries that valve stem up and down there, does it?

A. It just works; it moves it more or less up and down every time it goes back in.

Q. And I suppose that movement has a tendency to wear this bearing where the valve stem goes into the steam chest, doesn't it?

A. Well, it naturally would.

Q. So that every movement that it makes, it wears off a piece of this packing, does it not?

A. Not necessarily.

Q. Now, this model that you have used in your direct examination doesn't show the steam chest?

A. Does not.

Q. And it doesn't show where this valve stem goes through the packing that I am talking about?

A. Does not.

541 Q. But it does show this rockerarm, does it not?

A. It does.

Q. And is that a perfect representation of a rockerarm and valve stem on a real engine?

A. It is a model.

Q. And this shows all the work that is done by a valve stem, does it?

A. It does.

Q. It just moves that valve back and forth?

A. With the exception of this steam chest. Of course, this, when an engine is working, is always full of boiler pressure on this valve.

Q. That makes friction on the valve?

A. Yes.

Q. Makes some force for that valve stem to use?

A. Yes.

Q. But it is nothing compared to the force that is conveyed to this piston, is it?

A. Well, the piston has no more as I can see. You have a higher pressure in the steam chest than you do in your cylinder. It depreciates all the way as it goes through.

Q. Do you mean to say that there is as much force communicated to that valve stem as there is to that piston which moves this engine and train and cars?

A. There is not.

Q. Now, then, if an engine is properly run, if its parts are in proper condition, you ought not to find a metal packing wearing out every trip the engine makes, ought you?

A. Well, those are not uncommon things.

Q. In an engine that is in good condition?

A. Not uncommon, no. Sometimes the better the condition the oftener you have to change the packing at the start.

542 Q. Although the life of those packs you have testified to be a year, or from shop to shop, yet you would expect that with an engine in perfect condition, properly managed and run, that they would wear out in a day?

A. I would expect they would give out most any time, that is, they would wear so that they would leak steam.

Q. And as an officer of a Railroad Co. if you had notice that one of these packings was being reported in every run the engine made for more than a week, you would give it no attention at all?

A. Will you just repeat that Mr. Austin. I didn't catch onto that, all of it.

(Ques. read.)

A. I would give it attention.

Q. Now, what attention would you give it?

A. Well, we would have the packing renewed.

Q. That is all the attention you would give it, would it be?

A. No, sir; we would see if there was anything wrong.

Q. You would look on that valve stem, wouldn't you, to see if there wasn't something the matter with that valve steam that was wearing out that packing so remarkably fast?

A. I would look into it and see what the trouble was and if there was any.

Q. Well, now, on this occasion January 11 and 12, what position did you hold in that Company?

A. Traveling engineer.

Q. You were not Acting Superintendent of motive power then?

A. Not as I remember.

Q. Your business was to look these engines over and see if they were all right, was it?

A. Yes sir, part of my duty.

543 Q. And when you got into the round-house your business was to look at that work box and see what was reported on it?

A. No, sir.

Q. You didn't look it over?

A. I did, but it was not my duty to look it over every trip.
Q. Was not?
A. No.
Q. A proper inspection of an engine should be made how often?
A. They are made every trip.
Q. Every trip. In this case on the morning after this accident your Company was told, was it not, by McDonald to turn that right valve stem so that it will not leak?

(Objected to as immaterial and not cross-examination. Discussion. * * * Question excluded.)
Exception by plaintiff.

Q. Now, you say it is a quite frequent condition for an engine right out of the shops and as good as new to leak steam where it ought not to leak steam, do you mean exactly that?
A. I do.
Q. And one of the reasons you assign for that is that there may be some scratch or mark of a tool on a moving part. I suppose that you had direct reference in your mind to a valve stem, did you not?
A. Why, any of the parts.
Q. Well, now, supposing there was a tool mark on a valve stem that was big enough to tear a packing in the joint and make it leak, is it good railroading and proper management of a railroad to wait until that tool mark wears off?

544 (AMEY:) Object to that on the ground that it assumes something that is not in this case.
(COURT:) Well, he has a right to assume some things in cross-examination. He may answer it.
Exception by Defendant.

A. I would not.
Q. No; it would be better management, wouldn't it, to remove that obstacle to perfect operation?
A. It would.
Q. Now I want to call your attention to these books.

(AMEY:) Do you want this typewritten sheet?
(W. AUSTIN:) No, I prefer the books.
(AMEY:) You are suspicious?
(W. AUSTIN:) I am from the way you read them yesterday.
(AMEY:) I want to take an exception to the remark of my brother.
(COURT:) Well, you may have an exception, but that occurred in conversation between counsel and not in the remarks to the Court, and that is improper, the talk between counsel.
Exception by Defendant.

Q. I want to call your attention to an item that was omitted from the reading by Bro. Amey yesterday, namely,—"Dec. 21, and ask you if the words "Pack right valve stem" have anything to do with leaking steam?
A. It might have been.

Q. Well, what is the packing of a right valve stem for?
545 A. There might be a reason for it other than steam, and still it might be steam. I couldn't say from the book now.
Q. Now, another item which you did not have an opportunity to answer. Look at January 5, "Tighten right valve stem". Did that have anything to do with leaking steam?
A. It might and might not.
Q. Now turn to Jan. 7, which I think is the next book mark there. Just a moment—"Put gasket in front over-pass," under that Jan. 5 item—that have anything to do with leaking steam?
A. It might.
Q. Now, then, again turn to January 7, the next book mark, "Put asbestos gasket in right front over-pass head",—does that have anything to do with leaking steam?
A. It might.
Q. "Pack right valve stem",—does that have anything to do with leaking steam?
A. It might have something to do with it.
Q. Now, turn to the next one, January 10, "Pack right valve stem",—does that have anything to do with leaking steam?
A. It might have something to do with it, if it was packed.
Q. Now, you say the engine was reported for repairs every trip?
A. Every engine is.
Q. Every engine is reported for repairs every trip. Well, now, I am referring to this new engine. Was this engine from Dec. 12 to January 12, as shown by those books reported for repairs every trip she made?
A. I can't say without going over the records.
546 Q. Well, then, when you sit there and say that every engine is, you don't mean it, do you?
A. I never see one come in that didn't book something off.
Q. Well, then, you would let us assume that that would apply with equal strength to 708, wouldn't you?
A. I don't understand what your question is, Mr. Austin.
Q. If that works with reference to other engines, it works with reference to 708, doesn't it?
A. It does.
Q. Then, looking over this record that you have testified about, Dec. 14, 16, 18, 21, Jan. 5, 7, and 10, you would say that those represented every trip she made during that month, would you?
A. It might, I couldn't say now.
Q. And if she was leaking from the right valve stem every single trip she made for a month, what would you say,—had she been packed when she was reported, or was there something the matter with that valve stem?
A. Well, that is a question that couldn't be answered without the man had examined it.

Redirect examination by Mr. AMEY:

Q. Does it indicate that an engine is not in proper condition and

not properly cared for because the right valve stem is reported as to be leaking?

A. No, sir.

Q. Is that something that occurs frequently with every engine?

A. It does.

547 Mr. STORMS recalled.

Examined by Judge PALMER:

Q. I believe you stated yesterday, Mr. Storms, that you was——

(W. AUSTIN:) I understand there are only two parties in this case. There are only two parties in this case, as I understand it, the plaintiff, and defendant railroad company, and I assume that the same rule will obtain in this case as obtains in all others, that a witness shall be examined only by one attorney on one side. This witness has been used by the defendant twice, and Brother Amey examined him.

(PALMER:) You object to my asking the witness a question, do you?

(W. AUSTIN:) Yes.

(PALMER:) Let that appear in the record Mr. Amey, you may proceed.

Examined by Mr. AMEY:

Q. Mr. Storms, as a despatcher, do you keep a record of the speed and trips of trains?

(AUSTIN:) That has all been gone over with this witness.

(AMEY:) That is a preliminary question.

(COURT:) Well, you did ask him, he has been on the stand
548 four times, and during that time I remember, somebody, I don't know as you have, my recollection is that he has been asked that question, but it will take less time to let him answer it.

A. Well, we have the record on the sheets showing the time at all stations. Of course, it would show the speed.

Q. What is the average speed of freight trains over your road?

(W. AUSTIN:) We object to that, it is immaterial.

(COURT:) How do you claim it is material?

(AMEY:) I claim that it is material for the purpose of showing that train 401 was not making its time, not making the average time of a train—that it was delayed on the main line under Rule 99.

(COURT:) Well, this was a special train, under the rules it runs according to orders. Now, would that have a tendency to show what you offer to show by it?

(AMEY:) I will confine my question to extras, what we call extras, that was an extra train.

(COURT:) Yes, well, I hardly think that would show that fact, I hardly think that that would have a tendency to show that, because extras are run on orders.

(W. AUSTIN:) And they have already shown that extras
549 had no schedule.

(COURT:) Do you want that excluded subject to their exception.

(W. AUSTIN:) No, let it go, we have taken a lot and might as well take the rest.

(COURT:) Go ahead.

(AMEY:) I want to except to my brother's remarks just now when he says we have taken a lot, and I suppose we have got to take the rest.

(W. AUSTIN:) I retract that statement.

(COURT:) That is talk between counsel, and, as we suggested before, it shouldn't occur, the better way is to talk with the Court.

(AMEY:) Well, if the Court will pardon me, I think I understand why counsel makes such remarks all through this trial.

(COURT:) Well, an exception may be noted, proceed.

Exception by defendant.

Q. You may tell me what the average speed of extras is on your railroad?

A. I should consider a good average twenty miles an hour.

(AUSTIN:) We object to that answer, and want it stricken out.

(COURT:) We have allowed the question to be answered.

550 (AUSTIN:) That is not an answer to the question, what he considers, and the question is, what is the average.

(COURT:) Well, that is his opinion with reference to it, we will let it stand and an exception may be noted for the plaintiff.

Exception by plaintiff.

Q. Now, what is the maximum, approximately?
A. I should say twenty miles an hour.
Q. What is the minimum, approximately?
A. Fifteen miles per hour.

551 W. A. ASHTON, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. What is your business, Mr. Ashton?
A. Road foreman of Engines.
Q. On what road?
A. Delaware and Hudson.
Q. How long have you been Road Foreman of Engines on the Delaware and Hudson?
A. Since 1904.
Q. What was your business prior to that time?
A. Locomotive engineer.
Q. How long were you a locomotive engineer?
A. About fifteen years.
Q. And as Traveling Engineer—you say you are Traveling Engineer now?
A. Yes, sir.

Q. As Traveling Engineer what are your duties?

A. I look after the condition of the engines on the road, see that they haul their proper tonnage, and see that the crews are doing their proper work and examine the men for promotion, firemen to engineers.

Q. Now, sir, is it your duty to look after the condition of engines and see that they are kept in proper condition?

A. I report all defects to the mechanical department, yes, sir.

Q. I will ask you that if from your observation and experience, it is possible to prevent steam leaking from engines?

A. Why, some parts of the engine it is practically impossible.

552 Q. Now, sir, where are the normal places for steam to escape from an engine?

A. Why, the valve stem is one of the principle troubles, perhaps the piston packing would come next.

Q. Is it possible to keep the valve stem in such condition at all times that it won't leak steam?

A. Practically impossible, depending of course upon the temperature.

Q. You may tell the jury whether steam is more apt to leak in cold weather than in warm weather?

A. Steam in its own temperature is invisible, and the colder the weather, the more apparent it is.

Q. And what effect does the cold weather have upon an engine, does it have an effect to contract the parts?

A. Very much harder on an engine in cold weather on account of contraction and expansion, yes, sir.

Q. Where are the places for steam to escape normally?

A. Why, through the pop valves, through the stack, the exhaust steam from the stack.

Q. And are there any other valves from which it escapes normally?

A. Except the exhaust from the air pump.

Q. Is it an extraordinary thing, or is it a usual thing for engines to start on the road from one terminal and before they reach another to leak steam?

A. Oh, that is very often the case.

553 Q. Is there anything devised by human ingenuity up to the present time to prevent that?

A. There isn't, no, sir.

Q. Now, will an engine sometimes leak steam just after it has come out of the shop?

A. Why, it is very apt to just after it comes out of the shop until it gets worn down, at any rate.

Q. You may tell the jury why.

A. Well, it is invariably in the work and fitting of the valve stem and piston rod packing, has to wear down to make a fit, they are metallic substances working against one another, and the more they wear, with the proper care, the better condition that they should be in.

Q. Have you in mind what is meant by the overpass head?
A. We have them on all piston valves.
Q. What is the overpass head?
A. Why, it is a head that fits over the end where the overpass valves—we call them drifting valves on our road—is put in for the purpose of making the engine free and drifting.
Q. Does steam sometimes leak from the joint?
A. It is apt to, yes, sir.
Q. Is there any way devised to keep those absolutely tight at all times?
A. Well, we figure that they are kept tight, but of course they get loose occasionally with the hard usage.
Q. And when they get loose, it is the duty of the company
554 to tighten them, is it?
A. It is the duty of the engine men to report the conditions.
Q. Is that reported on a book to the Motive Power Department?
A. Yes, sir, should be.
Q. And is that a proper care of an engine when repairs are needed for the engineer to report the repairs to the Motive Power Department at the terminal and for the employees at the terminal to make the repairs?
A. Those repairs have to be reported by the engine man because they only leak when they are using the engine. The inspector couldn't get those leaks.
Q. Now, are there ever any scratches on the parts that cause leaking?
A. Oh, yes.
Q. Now, you may explain that to the jury.
A. Well, if the valve stems and piston rods haven't got the proper lubrication, the two metal substances, they are bound to scratch the pistons, sometimes the metallic packing will have hard spots in it, be very apt to scratch them.

Cross-examination by W. AUSTIN:

Q. Now, this packing is conical in shape, isn't it?
A. Yes, sir.
Q. And the packing-box in which it fits is also conical in shape?
A. Yes.
Q. So that when you say that the package should fit down
555 as it wears, of course you take into account the fact that the pressure of steam and of that spring against the packing bringing these conical surfaces of the inside of the packing box and outside of the packing together, press the packing against the piston all around?
A. Yes, sir.
Q. And that, with a proper piston and proper management of the engine continues until the packing is worn out, does it not?
A. Not necessarily, no.
Q. In general?
A. No. I will explain it. This packing is cut open for the pur-

pose of allowing this spring to force it tight in this cone to the piston, it very frequently—and you can see that it doesn't take but a little while until these two ends come together (indicating). As soon as they come together, it can't take up any more, and it has to be cut open so that it will continue to take up. Now, that happens very frequently that you have to take this down and cut it open so that it will have an opportunity of getting back against the piston or valve stem, as the case may be.

Q. But the object is in the shape of that packing box and of the packing to improve the fitting of the packing as it wears?

A. Well, that is one idea, and the cone shape, it is made cone shape also for the purpose of overcoming whatever motion that this valve stem may have other than its in and out motion. It may have some up and down motion or side motion, and it is made
556 that way so that this will work in here and keep that a steam tight joint.

Q. It is like a ball and socket joint?

A. Yes, sir.

557 F. A. Ross, called by defendant, sworn.

Direct examination by Mr. AMEY:

Q. What is your business?

A. I am chief clerk to the General Superintendent of Transportation of the Central Vermont.

Q. And as such do you have access to the records?

A. Of the trainmen, yes.

Q. And do you have in your office the schedule of wages?

A. Yes.

Q. Wish you would tell the jury what the increase of wages for brakemen was in January, 1912, or thereabouts.

A. Why, you refer specifically to the through freight service in which Mr. White was engaged?

Q. Yes.

A. It was an increase of about 8½%, nearer 9 than 8.

Q. Where was Mr. White running between December 9, 1911, and the time of his decease?

A. Almost exclusively on the main line between St. Albans and White River Junction, he made one trip to Rouses Point and return.

Cross-examination by W. AUSTIN:

Q. Put that increase in other language, brakemen received $2.42 per hundred miles, instead of $2.23 per hundred miles, as formerly?

A. Yes, that is correct.

558 Mr. HAIGUE, recalled by Mr. Amey:

Q. I wish you would turn to those books, Mr. Haigue, and to the page where the repairs appear to have been made by one Hatch. That is the record made by one Hatch. Now, sir, what date is that?

A. That is December 18.

Q. Is Hatch in the service now?
A. That—no, sir, it is Heath, the man.
Q. Heath?
A. Heath, he isn't in the service now.
Q. And is he in town?
A. Why, I don't think so.
Q. I want you to tell me whether on that date the booked repairs were made?
A. The repairs were done with the exception of one item.
Q. What is that?
A. Tighten up the front over-pass head.
Q. That was on that day?
A. Yes, sir. December 18.

Cross-examination by W. AUSTIN:

Q. And that was the only item of repairs on that occasion that had reference to leaking of steam, wasn't it?
A. Yes, sir.

(W. AUSTIN:) That is all.
(Fusee and torpedo and lantern received in evidence.)
(AMEY:) Mr. Haigue testified that on the 18th of December, the report was made, "Face front by-pass head so it won't leak," and that that repair was not made. I want to show that on the 3rd of January that repair was made on this engine, and if I may be allowed to show it by Mr. Haigue, I won't have to *to* wait for
559 the workman to get up here. I have sent for him.
(W. AUSTIN:) We have no objection to that.

Re-examination by Mr. AMEY:

Q. You find the 3rd of January, the record of 708 on the 3rd of January.

(W. AUSTIN:) That is something new, the 3rd of January, never heard of it before in this case.
(AMEY:) Well, I want to simply show that that repair was made, it was reported subsequently that this stem was reported for repair, and the repairs made to this by-pass head.
(WITNESS:) January the 7th, wasn't it?
(COURT:) Do you object?
(W. AUSTIN:) No, Your Honor. The 7th, well, that is all right.

Q. Was that work done on January 7 that had previously been reported?
A. Yes, sir.
Q. On the 18th of December?
A. Yes, sir.
Q. And was it again at that time reported for repairs?
A. Yes.
Q. And the repairs were made?
A. Yes.

Recross-examination by W. AUSTIN:

Q. That was the third time that that had been reported, wasn't it?
A. The record shows from the 18th up to this date that it had not been reported during that time, up to this.
560 Q. Then, you turn to January 5, and see if the record doesn't show that it was reported.
A. It was reported on the 5th, and it was repaired on the 5th.
Q. Well, then, why do you refer to the 7th to show that the repair was made for a report of December 18?
A. It should have been the 5th, the time that it was repaired, the 5th.

Defendant rests.

561 *Plaintiff's Rebuttal.*

L. O. GIBBONS, recalled by Mr. W. Austin:

Q. At the time and place of the accident, were you making your customary speed?
A. Yes, at the time and place.
Q. At what rate of speed were you paid wages?
A. On a basis of ten miles per hour.

Cross-examination by Mr. AMEY:

Q. You don't mean to say, Mr. Gibbons, that your customary speed on that freight train was ten miles an hour?
A. I considered it was for the place.
Q. For the place?
A. For the place.
Q. Well, did you sometimes on your trip go faster?
A. Some places.
Q. You don't mean to tell me that you never went any faster than ten miles an hour when you was running other places?
A. There is places we went faster than that, yes.
Q. How much faster than that?
A. Well, probably was places that we went—possibly not that night—that we ofttimes go thirty miles an hour.

562 WILLIAM L. WRIGHT, recalled by Mr. W. Austin:

Q. At what rate of speed were you paid?
A. At the rate of ten miles an hour.

Cross-examination by Mr. AMEY:

Q. Well, sir, does that mean that you never went any faster?
A. No, it don't. Not that we never went any faster than that, that I know of.
Q. Now, doesn't that mean that if you went ten miles per hour on your trip, that you got your day's pay just the same, isn't that what you mean?

A. I don't quite understand the question.
Q. What do you mean by being paid for ten miles an hour?
A. At the rate of ten miles an hour.
Q. Well, what do you mean by that?
A. Well, ten hours conclude the day's work.
Q. And you mean to say that if for ten hours in a day, you made ten miles an hour, you got a day's pay, is that what you say?
A. Yes, or a hundred miles.
Q. Or a hundred miles, you got a day's pay?
A. Yes.
Q. So if you made 150 miles a day, you got a day's pay, did you?
A. I got 150 miles.
Q. Yes, sir, you got 150 miles. Well, you mean to say that you got more for 150 miles than you did for 100 miles?
A. Yes sir, more for 150 miles.
Q. Then your pay was graduated according to the miles you made, was it?

A. Yes, sir, graded at ten miles an hour.
563 (Question read.)
A. Yes, according to the miles we made.
Q. If you made 150 miles a day, you got pay for 150 miles, and if you made 100 miles a day, you got pay for 100 miles, is that right?

A. If we made a hundred miles, yes, sir.

Plaintiff rests.
Defendant rests.
Evidence closed.

(AMEY:) Now I have some short matters for the Court. I have some motions.
(COURT:) Well, is it in writing?
(AMEY:) I haven't them in writing at this time. I would like to dictate them to the Court.

564 *Defendant's Motion for Verdict.*

(AMEY:) Now comes the defendant in the above entitled cause and moves this Honorable Court to direct a verdict in its favor, because upon all the evidence introduced in said cause, the plaintiff is not in law entitled to recover.

Another motion for a directed verdict. Because the action purports to be brought under the Federal Employers' Liability Law, but the declaration does not so state, and the replication purporting to be an amendment to the declaration, does not bring the matter within the purview of this Federal Law. Hence, to render a verdict for the plaintiff under the pleadings as they now stand would be in violation of the Fourteenth Amendment to the Federal Constitution, which forbids the taking of property without process of law and guarantees to everyone equal protection of the law.

Another motion for a directed verdict. Because the evidence

shows that the Master was free from fault, that there was nothing which the Master failed to do which became negligent on the part of the Master, which was the proximate cause of the injury, which resulted fatally.

Another motion for a directed verdict. Because on all the evidence it appears without contradiction that the proximate
565 cause of the injury to the plaintiff's intestate was due to his failure to observe a rule of the company which was binding and which left no discretion in him under the circumstances as they existed.

Another motion for a directed verdict. Because the evidence without contradiction shows that the proximate cause of the injury was the failure of the deceased brakeman, the plaintiff's intestate, to put down his torpedoes and fusees at Randolph as the rule required.

Another motion for a directed verdict. Because the evidence shows that he was instructed and directed to protect the rear of his train by the conductor and that he failed to do this.

Another motion for a directed verdict. Because the declaration states that the plaintiff's intestate was injured by a cause of injury unknown to him, that he did not know and comprehend the danger in which he was placed at the time he received his fatal injury, while the evidence does not show that, hence the plaintiff has fallen short of the allegations in his declaration in a vital and material matter.

Another motion for a directed verdict in favor of the defendant. Because it is beyond dispute that when a railroad has delib-
566 erately adopted a system of rules under which the employees are employed, and which they understand, the reasonableness and sufficiency of these rules are questions of law and not of fact. These questions must be determined by the Court because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient. There is no dispute but what Rules 99 and 91 are Standard Rules, that they were in force at the time of this accident, that the plaintiff was operating under them. These rules have been established by the best railroad experts in the country, and being the result of large experience of the best railroad authorities, and the undisputed evidence received in this case, and its having been stated without dispute that as a result of this experience, Rules 99 and 91 are safer than notice from stations along the line of the position of trains running on the same order, it is therefore no negligence on the part of the defendant to run its trains, its two extras as it did in this case, on the night of January 11 and morning of January 12 without receiving messages at the different stations between White River Junction and the scene of the accident.

Now, another motion for a directed verdict, because the declaration purports to be under the Federal Employers' Liability Law, while the part which relates to the damages is absolutely under the statute law of the State of Vermont. I think it is Section
567 2840, for the amendment to the Federal Law of April 5, 1910, shall be construed as dedicating the fund recovered to the widow and children, as specified in Section 9. Then there is

discord between the provision of the Federal Law and the law of Vermont. By the Federal Law the grand children of the deceased would receive nothing *of* the deceased's parents were living; by the law of Vermont, the grand children will take it all to the exclusion of the parents. By the Federal Law, in case there were no widow or husband, or children, or parents, the distribution would be to such of the next of kin as were dependent; by the Vermont law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased. So that a general recovery under this declaration would produce a fund which the Court wouldn't know how to distribute.

(PALMER:) Could I add just one—And for a further reason, that the plaintiff's declaration and the theory of the Court in the trial of the cause seeks a plaintiff's recovery under the Federal Statute, and there is no evidence in the case showing that the defendant in the operation of the train in question upon which the plaintiff's intestate was killed, was engaged in interstate commerce, and an entire absence of evidence that at the time of the accident, the plain-
568 tiff's intestate was engaged in interstate commerce, as provided and required by the Federal Act of Congress and the decisions of the Court under that Act require.

(COURT:) Well, the motions may be overruled, and exceptions noted severally to each motion. They are severally overruled, and exception allowed to the defendant.

Exception by defendant.

Adjournment to 2.00 P. M. Monday.

(Pl'ff's exception to argument of Mr. Amey Notes P. 161. * * *)

569 *Charge.*

MILES, *J.:*

GENTLEMEN OF THE JURY: This is an action on the case in which the plaintiff seeks to recover from the defendant for negligence which she claims resulted in the death of her intestate. This being an action of negligence, in order for the plaintiff to recover, she must establish*ee* that the defendant was negligent, and not only must she establish that the defendant was negligent, but she must also establish that that negligence proximately contributed to the death of her intestate, or was the proximate cause of it. She takes upon herself the burden of making out that she has a cause of action against this defendant. She claims that the defendant was negligent in the operation of train drawn by Engine No. 708, and I shall refer to that train as train No. 708, and to the train drawn by engine No. 401 as train No. 401.

Negligence, as has been defined by our courts, is a shortage of duty which one party owes to another. In this case, it was the duty which the defendant owed to this plaintiff's intestate and all the other employees on train No. 401, to operate train No. 708 in a careful and

prudent manner, in a manner such as it should have been
570 managed by a careful and prudent man, so as not to do injury to its servants on train No. 401. It was to use the care of a prudent man in the operation of that train, which was to follow train No. 401, and on the other hand, it was the duty of the plaintiff's intestate to use the care of a prudent man in like circumstances for his own safety and for the safety of train No. 401. These were reciprocal duties which the Master, on the one hand owed to the Servant, and which the Servant owed to the Master on the other hand. This being an action of negligence, as we have already said to you, negligence must be proved in order to make the defendant liable. It is not enough to prove that an accident has happened, for that often occurs without the negligence of anyone, but the question for you to determine in this case is whether the defendant was negligent, and whether that negligence proximately contributed to the death of the plaintiff's intestate, or was the proximate cause of it.

The plaintiff claims that the negligence of the defendant, which caused the death of her intestate, was the running of train No. 708 with its defective engine; that it never should have run that train from the station at White River Junction; that it was negligent in that it did not give such warning to train No. 708 and train 401 as it ought to have given in the circumstances of the case, in consideration of the condition of engine No. 708; that engine No. 708 was
not in proper condition and was not suitably and properly
571 equipped, and to recover in this suit, she must make out this negligence which she claims.

The defendant, as well as the plaintiff, has used as evidence in this case, some of the rules of the defendant company, tending to show on the part of the defendant, tending to show that the defendant was following those rules at the time of the accident, and that those rules were such as were in general use by railroads throughout the country. They have been denominated in the course of the trial as General Rules. If you find such to be the fact, that would be evidence tending to show that the defendant was operating the train at the time of the accident in a prudent manner, if you find that he was following those rules and adhering to them, but if the conditions were such on the occasion of this accident that a prudent man ought and would have foreseen the accident that might and probably would happen, if those rules were followed, it would be negligence on the part of the defendant to follow them if there was any reasonable way in which to operate train No. 708 for it to avoid such accident.

The defendant claims that it was operating this train at the time of the accident according to those rules, depending upon the plaintiff's intestate following the rules himself for the protection of the train drawn by engine No. 401, and upon his flagging the train or putting out torpedoes and fusees, and that if this had been done by the plaintiff's intestate, no accident would have happened to the plaintiff's intestate.

572 In other words, the defendant's claim is that the plaintiff's intestate neglected his duty and in consequence of his neglect, and solely in consequence of that, this injury happened, and the plaintiff's intestate lost his life. If the defendant has made that fact

out, as it claims, that the accident occurred solely through the negligence of the plaintiff's intestate, then the plaintiff in this case cannot recover, and your verdict should be for the defendant. But this point is a claim made by the defendant, and it is incumbent upon *him* to establish that fact by a fair balance of all the evidence in the case, that is, you must be more inclined to believe that the plaintiff's intestate neglected his duty than otherwise in order to find that fact.

The plaintiff claims that her intestate did all on that occasion that his duties under the rules and under his employment required, but that because of the negligence of the defendant, as claimed by her, this accident occurred and her intestate lost his life. She claims further that although you might find that the defendant was following these rules on the occasion in question, that because of the condition of engine No. 708, the defendant had no right to run train No. 708 as it did run it, and that it had no right to follow those rules in view of the condition of engine No. 708 leaking steam as she claims it did.

573 If she has made out these claims by a fair balance of the evidence, and the claims which she makes before you, then she is entitled to recover although you may find that her intestate was also negligent and that that negligence contributed to his death.

Under the claim of the parties, as stated to you by the Court, the inquiry rises, has the plaintiff made out by a fair balance of evidence that the defendant was negligent in the respects claimed by her, and that that was a contributing cause to the death or the proximate cause of the death of her intestate. If she has made this out, as we have said to you, by that measure of proof she is entitled to recover, but if she has failed to make it out, your verdict should be for the defendant.

In determining this question, you are to take in to consideration the claims of the defendant that the plaintiff's intestate was negligent in not putting out torpedoes and fusees at Randolph, and that he was negligent in not putting out fusees between Randolph and the place of the accident, and that this negligence on the part of the plaintiff's intestate was the sole proximate cause of the accident and of his death. As we have said before, if this is true, then the plaintiff could not recover, because it is incumbent upon her, as we have said to you, to show that the defendant was guilty of negligence, contributing proximately or the proximate cause of this accident.

574 Now, in considering these claims, of various parties, and especially of the defendant, you are to determine what the duty of the plaintiff was for the protection of 401, and this duty, as is claimed by the defendant, is largely to be gathered from rules 36 and 99 of the defendant corporation. Testimony has been given to you with reference to the manner in which those rules were construed by the company, and the manner in which they should be construed, but the court regards it to be its duty to construe those rules and hence we do so. Rule 36 provides as follows: "A red or yellow fusee, as the case may require, will be used for protection of a train which is not making the speed required by sched-

ule or train order, and is liable to be overtaken by a following train." We construe that rule to mean that it was the duty of the plaintiff's intestate, as rear brakeman of that train, to put out a fusee when certain conditions existed, and the rule being a command to him, that it was his duty to determine that question, that is, it was his duty to determine whether the train 401 was making the speed required by the train order, as there was no schedule time, and that also he was to determine whether it was liable to be overtaken by a following train. If the train was not making the speed required by the train order, and that train was liable to be overtaken by a following train, and that he, as a prudent
575 and careful man ought to have known that, then it was his duty to put out fusees between Randolph and the place of the accident, but before he was called upon to do this, these conditions must have existed, that the train was not making the speed required by the train order and that he, as a prudent and careful man, knew or ought to have known that the train was liable to be overtaken by a following train. Under this rule, if the train was simply losing time, it would be sufficient for the plaintiff to have put out a fusee, either red or yellow, and if he in that condition, as a prudent and careful man, reasonably apprehended or knew or ought to have known that it was liable to be overtaken by another engine.

Rule 99 contemplates a case where the train is so delayed upon the main line that the brakeman or the flagman can get off safely from that train, can alight from the train with safety to his person and to his life, and it is in such a case where he may be recalled to the train if desired. 99 provides: "When a train stops or is delayed on the main track, under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals, a sufficient distance from the train, to insure full protection."

The defendant claims that train 401 did stop and was delayed on the main track at Randolph, under circumstances in
576 which it might be overtaken by another train, and that it then and there became the duty of the plaintiff's intestate to deposit torpedoes in the rear of train 401, and to set up or deposit fusees. If you find that train 401 was stopped and delayed upon the main line at Randolph, under such circumstances in which it might be overtaken by another train, and if the plaintiff's intestate, as a prudent and reasonable man, understood and apprehended and ought to have understood and known that it was liable to be overtaken by another train, then it was his duty to dismount from train 401, go back a distance as required by the rule, deposit the torpedoes and fusees, as stated in the rule I have read to you, and that is a question of fact for you to determine. The defendant claims that he did not do it, and the plaintiff claims that he did. It is not for the plaintiff to prove that her intestate did this, but it is incumbent upon the defendant to prove, as we have told you by a fair balance of evidence, that the plaintiff's intestate neglected to do it.

As the court understands the claims of the different parties, the defendant does not claim that between Randolph and the place of the accident, that it was the duty of the plaintiff's intestate to dismount and deposit fusees and torpedoes, but that it was his duty to deposit fusees. Under the instructions the court
577 has already given to you, it is for you to determine whether such a condition existed as required him to do that.

Now, should you find that the defendant was not guilty of contributory negligence which proximately produced the injury, why, then your verdict, as we have already said, should be for the defendant. Should you find that the defendant's negligence did contribute to the accident, or was the proximate cause of it, then you will pass to the question of damages.

In estimating the damages, if you come to that question in this case, you are confined to the pecuniary loss sustained by the widow of the plaintiff's intestate, and their children. You can not take into consideration their grief or mental suffering, nor can you give damages by way of solace for that grief, sorrow and mental suffering.

The pecuniary loss in a case of this kind, under the law, as it now is, is not to the intestate of the deceased person, but it is to those who have a reasonable expectation of pecuniary benefit as of right or of duty or from a recognized sense of obligation from the continuance of the life, and that is the foundation of this action. In estimating such damages, you may consider the plaintiff's intestate's personal character and mental and physical capacity, which has been shown in evidence here before you. In other words, you are to say how much pecun-arily is this plaintiff entitled to
578 recover for the loss of the care and protection and support of the plaintiff's decedent. How much would he be worth to them, to the family, and in addition to that, what have the minor children loss by reason of being deprived of the instructions moral and physical and mental of the plaintiff's intestate?

These are questions, gentlemen, which address themselves to your judgment. You are to put his services and his guiding hand to these children into dollars and cents, and in doing this, you are not only to use your best judgment, but you are to use your experience in human affairs to endeavor on your part to get at this matter right, to determine it as it ought to be determined without regard to the persons who constitute the parties to he suit. That is of no concern to us, for we can make no donation of others' property. If we do justly, we shall try to do by each party what we think is in law their right to receive, and the court asumes that that may be the effect and endeavor of this jury in determining the question of damages, if you come to that question.

In determining what he is worth, to the family, you should consider his actual earning power, and you should take into consideration his power to earn for the length of time that he may be expected to live. You should not consider that as all being
579 earned at the present time, but you should consider the present worth of that in determining how much you shall

allow for that. What is the present worth of what he could earn in thirty-three years from the time of the accident, his prospective life-time, what would be the present worth of it?

To illustrate, if he could earn two hundred dollars a year for thirty-three years, why the question would be, what would that be worth receiving $200 each year. It would not be worth at the present time the full value of $200 for thirty-three years added together, but it would be the present worth of that. Now, that is only one of the elements of damage that I have called to your attention. The other elements you take up as the court has instructed you, but when you consider that as one of the elements of damage, you should consider it in that light, what is the present worth of what he could earn during that thirty-three years? We are requested to charge you that notwithstanding that you find that engine 708 was leaking steam so that the engineer could not see the tail lights of 401 at the time of the accident, if the proximate cause of the injury was the failure of flagman White properly to put out fusees and torpedoes according to the company's rule, this plaintiff cannot recover. We can't charge you as requested in that, but we can charge you that although 708 may have leaked steam as the plaintiff claims, yet if you find that the plaintiff's
580 intestate was guilty of negligence, which contributed to his injury, then you could find for the plaintiff to recover, but that fact would be taken into consideration in estimating the damages which you should give to the plaintiff if you find her entitled to recover.

Now, then, if you come to the question of damages, and examine these as the court has called to your attention, there is another question which you must determine, if you find that the plaintiff's intestate was negligent, which negligence contributed to his injury. That is, after having found how much the plaintiff is entitled to recover, if you find that the plaintiff's intestate was also negligent, then you will diminish the amount of actual damage which the plaintiff has sustained in the proportion which the negligence of the plaintiff's intestate bears to the entire negligence which produced the injury or produced his death.

To illustrate, if the plaintiff's intestate was equally negligent with the defendant, then the damages which you had found the plaintiff had sustained, should be diminished by one-half, because that is the portion which the plaintiff's intestate's negligence bears to the entire negligence. If you find it to be two-thirds, that is, to contribute to the accident as much again as the negligence of the defendant, then you would diminish it by two-thirds. If you find it only to be one-third, why, then, you should diminish the actual damages which you find by one-third. Now, I have simply
581 stated it as an illustration, of the principal which I have laid down to you, which is, that if you find the defendant negligent and liable—because if he is negligent as we have told you, and that proximately contributed to the accident and the death of the plaintiff's intestate, then the defendant is liable, and as I say, we have given you this illustration to explain the rule

that we have laid down to you, that you would diminish the actual damages in the same proportion that the negligence of the plaintiff's intestate bears to the entire negligence which produced his death.

It is a proposition which, as the court has said with reference to the other question of damages, that calls upon you for your sound judgment and your experience in human affairs.

We are also requested to tell you that the damages alleged in the plaintiff's writ at $20,000 is not to be considered by you as a piece of evidence. It only limits the amount which the plaintiff can recover. She cannot recover beyond the amount alleged in what we call in law the ad damnum, and we do so charge you, and we assume that you would not have taken that into consideration as a piece of evidence if we had not called it to your attention, but being requested to charge you upon that point, we have done so.

582 We have also been requested to say to you that in making up your verdict, you should not take into consideration the wrangles and debates of counsel or exceptions taken by either side, or the extent of questions asked of jurymen by either the plaintiff or the defendant in making up the panel, and I think we so charged you before we commenced the trial of this case. If we haven't, we charge you so now. You are simply to confine yourself to the facts in the case as disclosed by the evidence in the case. We appoint Mr. Beebe as Foreman of this jury.

583 (COUNSEL at the Bench).

(C. G. AUSTIN:) The rule over which we have had our most contest has not been construed or alluded to by the court, that is rule 221. That is the one, you omitted that entirely.

(COURT:) How would that affect the case as I have submitted it, does it become important as I have submitted it?

(C. G. AUSTIN:) It looks so to us, it is one of our strongholds. 221 is where the train order clearance card omitted to show the next train ahead, and the plaintiff claims that was a shortage of duty in furnishing 708 with suitable warning of 401, the immediate presence, one of the most important questions in controversy.

(COURT:) Is there any dispute about that construction?

(W. AUSTIN:) Yes, there is a little dispute there on that, they claim that rule 91 is the rule that regulates the issuing of the clearance card, and we claim it doesn't, that this rule 221 is the rule that directs the use of the clearance card, rule 221 on page 40.

(COURT:) I have limited the negligence of the plaintiff to Randolph, and I think in the argument of counsel, that there is where it was placed, at Randolph. There they claim that the plaintiff's intestate should have got out and deposited a fusee and torpedo. Well, now, that being the case, you say that they should have——

584 (C. G. AUSTIN:) Issued the cle-rance card at Bethel, in accordance with rule 221.

(COURT:) How should I construe that so as to aid you any?

(C. G. AUSTIN:) That the issuing of that clearance card without complying with the rules of the company was a shortage of duty.

(COURT:) Well, what Warren, as I understood he claimed, was, they issued it there, but they didn't fill out the blank.

(W. AUSTIN:) That is it, exactly.

(COURT:) Well, now, I am not prepared to say that I could construe this as — I think that is a question of fact. They claim they issued it, but you claim that it wasn't filled out.

(W. AUSTIN:) Our claim about it is this. Rule 221 requires "A train stopped by a train order signal must not proceed without a clearance card Form 'A' ". Now, Form A is on page 122. There the rule requires, "If the next train ahead has not reached the next telegraph office, the words 'not yet' must be written in the blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type." Now, that is an essential part of the obedience to rule 221, is to have the clearance card filled out and not a blank for it.

(COURT:) How do you want me to charge that?

585 (W. AUSTIN:) I don't want you to open up this charge, only I am helping out father in his explanation here. I think it is perfectly obvious, although these experts said it was not, yet they admitted they couldn't point out anything, that excused them from doing it. You can't comply with rule 221 without filling out that clearance card.

(COURT:) Of course, he argued it as a fact, and the evidence was let in without any objection, you see.

(W. AUSTIN:) Yes. Well, now, in their request to charge, that is their first request to charge, and in their motion for a verdict, they claim that it is the duty of the court to construe the rules and say that they are a question of law and not of fact, and all the way through this case they have offered evidence.

(COURT:) Well, if it had been objected to I should have left it, as I told Mr. Amey, all out, just as they did in the Morrissette case.

(W. AUSTIN:) It is in, because we didn't care to have any exception.

(C. G. AUSTIN:) Now, you have construed some of the rules.

(COURT:) Well, I construed those two, as they were vital.

(C. G. AUSTIN:) Well, this we regard as one of the most vital rules.

(COURT:) Well, I will charge it if you want me to charge that.

(C. G. AUSTIN:) I think it is one of the most vital rules, that it is important.

586 (COURT:) Do you want it, Warren?

(W. AUSTIN:) I don't, no, but if father says so, let him take a chance on it, I don't ask it, I am satisfied with this charge the way it stands.

(C. G. AUSTIN:) We have tried our case on the theory that that was a non-compliance of the rule, on the part of the defendant

company by not furnishing proper warning to 708. I don't think there is any danger about that.

(COURT:) I shall have to, of course, in connection with that, I shall have to construe 91, if I construe it, because it says "Except as provided in rule 91."

(C. G. AUSTIN:) Do just as Warren says.

(COURT:) Of course, as it strikes me, I can't construe 221 alone, I have got to construe it in connection with 91, because that is an exception, and in connection with Form A and in connection with the note to Form A, I will construe it, if you say so, or any other rule.

(C. G. AUSTIN:) No, I won't, he thinks it ain't of any account.

(COURT:) Or for either side.

(W. AUSTIN:) Well, it is pretty well construed, as I view it.

(COURT:) But I thought the vital rules, and I think so now, the vital rules 36 and 99, as the case has been tried.

(W. AUSTIN:) They didn't dare put 36 in the case, they haven't' put 36 in this case.

587 (COURT:) They haven't?

(W. AUSTIN:) Oh, no; if I had had any idea that they had 36 in this case, my argument would have referred to it.

(AMEY:) It wasn't in by number, judge, but the different experts testified about it.

(W. AUSTIN:) Every expert except one, testified that rule 99 was the rule, and that this man ought to have gotten off the train between Randolph and the place of the accident, that he ought to have got off, every expert that they put on the stand.

(COURT:) I understood and I have got it marked as in.

(W. AUSTIN:) The only expert that they produced on the stand, who was conservative enough to mention the dropping of fusees in his testimony, was Mr. Rourke, the last one, and he said, and I observed it because he was an exception to the rest, he said, "Why, they ought to put down torpedoes and a fusee at Randolph and they ought to have dropped fusees between Randolph and the scene of the accident."

(COURT:) In their argument they didn't claim it, as I understood it—did you argue that he ought to have got off the train, do you claim that he ought to have got off the train between Randolph?

(AMEY:) I did claim that he ought to have got off the train between Randolph and the place of the accident.

(COURT:) And rule 99?

588 (AMEY:) Yes, and I claim also that he ought to have put out fusees.

(COURT:) I will charge with reference to that.

(W. AUSTIN:) I am not asking you to change your charge at all.

(COURT:) I don't know how I come to get in rule 36, I will withdraw it from the jury.

(W. AUSTIN:) No, leave it alone, that is all I have got to say.

(COURT:) Didn't you take the position that there was the place where he should have got off, at Randolph and deposited——

I didn't understand you said he should get off between there and the accident.

(PALMER:) I don't think I did so, I don't think I claimed that in my argument, I referred particularly to, that it was the duty at the station where the train was on the main line, but I will be frank with the court, I supposed 36 was in, however, I supposed it had been received and admitted.

(W. AUSTIN:) Leave it alone, judge.

589 *Defendants' Exceptions to Charge.*

(AMEY:) I want for the purpose of raising these law questions, I want to take an exception to the failure of the court to charge as requested in the request for instructions in Nos. 1 to 12, that is, the original requests for instructions, and in additional requests for instructions, to the failure of the court to charge as in 1, 5, 6, 7, and 11.

(COURT:) Well, an exception is allowed severally to each one of those in the first and in the second also.

(AMEY:) That is, we take an exception to the refusal of the court to charge as requested in 1 to 12 in the original requests, to charge, and to the refusal of the court to charge as requested in additional requests for instructions in 1, 5, 6, 7, and 11.

And I also want to take an exception to what the court said with reference to engine 708 because the court omitted to say that if they found 708, the jury found 708 defective, but that that defect was not the proximate cause of the injury then the defective condition of 708 would be eliminated from the case.

(COURT:) Do you want me to say anything further than I have upon that point?

(W. AUSTIN:) No, I don't think so.

(AMEY:) Now, I want to except to the charge of the court with reference to the negligence of the defendant in following
590 the rules, and if the jury found that the defendant followed the rules, but there were a better way, then the defendant still might be negligent.

(COURT:) This is what I said, "they have been denominated in the course of the trial as general rules. If you find such to be the fact, that would be evidence tending to show that the defendant was operating the train at the time of the accident in a prudent manner, if you find that he was following those rules and adhering to them. But if the conditions were such on the occasion of this accident that a prudent man ought and would have foreseen the accident that might and probably would happen if those rules were followed, it would be negligence on the part of the defendant to follow them if there was any reasonable way in which to operate train No. 708 for it to avoid such accident."

(AMEY: Well, that is what I want to taken an exception to. And I want to except to what the court said when he said it was the plaintiff's duty to determine whether the train was making the speed required, whether the train was liable to be overtaken by another train, upon the ground that the rules are positive about that, and there was no room left for discretion under the circumstances on the part of the plaintiff's intestate.

591 And I want to except to the construction which the court placed upon rule 99, when the court says, "If a train is stopped and delayed on the main line."

(COURT:) Did I say "and"?

(W. AUSTIN:) The court read from the rule.

(AMEY:) If I am wrong, it won't avail me anything. When the court said, "When a train is stopped and delayed on the main line, in such a way as to be liable to be overtaken by another train," instead of, "Stopped or delayed on the main line."

And I want to except to what the court said about rule 99, because the rule conveys the fact that where a train is stopped on the main line, it is an absolute duty under all circumstances for the flagman to protect his rear by fusees and torpedoes.

(COURT:) I thought perhaps Warren would take an exception to that.

(AMEY:) You can see my idea about it, I may be wrong about that, but I have got that notion.

(COURT:) I said, "If it was stopped on the main line," that is a question of fact, you know, of course, if it was stopped there.

(AMEY:) And then to the failure to charge about the contingencies of ill-health and loss or impairment during the

592 period of life, on the ground that—and also the contingency of death prior to the time limit of expectation.

(COURT:) Well, you see the supposition wipes out the liability, that is, it actually fixes his life for thirty-three years, you see. Now, assume that as a positive fact. Under the assumption he dies in thirty-three years, anyway, but he lives until thirty-three years. You may have the exception.

(AMEY:) I didn't consider it necessary for me to put in evidence about that.

(COURT:) Unless you want me to charge that?

(W. AUSTIN:) No, I think that table is based upon the theory that they take into account all those contingencies.

(PALMER:) I want to except to the charge of the court where the court says in substance that plaintiff's intestate claims that the defendant had no right to run engine 708 in the condition it was, and if you so find, she would be entitled to recover. Now, I have quoted the language as carefully as I could in long hand.

(COURT:) Didn't the plaintiff claim that?

593 (PALMER:) Yes.

(COURT:) I don't get your exception.

(PALMER:) My exception is that you charged that the defendant had no right to run 708 in the condition that it was, and if you

find it in that defective condition, if you so find, the plaintiff would be entitled to recover.

(COURT:) Well, I said before that he claimed, the plaintiff claims that it was negligence to run that engine from White River Junction. Now, I say if that claim is true that it was negligence to run it, if he has made out his claim there, then the plaintiff is entitled to recover, because that would be negligence. It is a matter of law, if they put an engine on there that ought not to be started out of the station—That was the proximate result I put on that, if it proximately contributed to the injury, why, then the plaintiff would be entitled to recover, although the plaintiff's intestate might be guilty of contributory negligence.

(PALMER:) I have got in mind something that I thought wasn't the law. I have made a note here to except to your construction of rule 36.

(COURT:) Well, do you want me to strike 36 out or do you want to treat it as in the case? If not, I am going to take it out,
594 you know.

(AMEY:) Leave it alone the way it is.

(PALMER:) Now, I want to except to that portion of the charge of the court wherein he says in substance that it was the plaintiff's duty to determine whether 401 was making the time and whether he would be overtaken by a following train. That is the substance of the charge, and that is your claim, you know, all the way through.

(C. G. AUSTIN:) No.

(COURT:) They have claimed that it was the conductor. I have construed that in your favor. They claimed it was the conductor's duty, and Warren argued it.

(PALMER:) Of course, that may be his claim, so far as the conductor is concerned, but my contention is that under the rule so far as the evidence in this case relates to the station at Randolph, there was no question for the plaintiff's intestate to determine, there was absolutely no discretion to be had in the matter one way or the other.

(W. AUSTIN:) That is true.

(COURT:) We all agree to that. Nobody disputes that, but before it was his duty to do that, why the trains must be in the conditions prescribed by the rule.

595 (PALMER:) Exactly.

(COURT:) But there is no discretion. I held that it was a command, I said being a command he was bound to do it when that condition arose.

(PALMER:) Well now, I think that in your charge you have left it in a way where the jury might say that he had a discretion in determining whether or not the condition had arrived where he was bound to act. Well, now, if you haven't said that, why, this won't do any harm, but I am quite sure——

(COURT:) I have it just as your witness testified, that was the question for him to determine, not for the conductor.

(PALMER:) Oh, no, I am laying the conductor out entirely, I say there is nothing for him to determine.

(COURT:) Warren said that, there wasn't anything for him to determine.

(PALMER:) He tried to get it off on the conductor, but I say it was the brakeman, if anybody, but there was no condition existing or could exist in those circumstances where there was any mental operation on his part required, except to either violate the rule or go and put down his flag.

(COURT:) Judge, you are overlooking the bearing of this thing, as it occurs to me. He wasn't obliged to do it, if his train wasn't losing time, was he, and he wasn't liable to be run in to, was he? If he was, he would have to do it the whole length of the line, you know. Now, that is the view we took. Now, then, before he
596 puts those out, the train had got to be losing time, and the liability for another train to run in to it. Now, somebody has got to determine whether the train was losing time, and whether it was time for another train to run in to it, you see, and I say that that was his duty and not the conductor's, as Warren claims.

(PALMER:) Now, that is just what I want the exception to, because I maintain——

(COURT:) Just tell me how you want me to charge on that point, and I will charge.

(PALMER:) I am discussing now the decision at the station when they were standing on the main line, that is what I argued to the jury.

(W. AUSTIN:) There the conductor commanded him to go, and he went.

(PALMER:) I have eliminated the conductor, but when they were standing on the main line, that the only mental operation there was for that flagman to consider was whether he should obey this rule or disobey it.

(COURT:) My construction, I guess you will find, Judge, was with reference to the train between Randolph and the place of the accident. I put it right down positive. I am inclined to think that possibly Warren has got a good exception, if he took it. At that station, I put it right down square that it was his duty
597 to get off there, and it was a question of fact whether he did or not. But the burden was upon you to prove it.

(PALMER:) Well, I don't think that that is a question of fact. That is what I want to get, a construction of that rule. I think that rule, especially so far as it relates to that question right there, is absolutely a question of law. I don't think there is any question of fact in there for the jury.

(C. G. AUSTIN:) I don't believe that applies to depots anyway, the fair construction of the rule is when it stops on the main line.

(COURT:) I expected you would take an exception to that, and also to my construction of rule 36. How should I charge on that, Judge, perhaps I will charge as you want me to.

(PALMER:) Well, if I were going to try to charge the jury on a question of that kind I should tell them that it was the duty of

the flagman, under that rule, to absolutely get off and go and flag that incoming train. There wasn't any discretion on his part.

(COURT:) Whether it was standing still or not?

(PALMER:) No.

598 (COURT:) That is the only question I submitted to them. If it was standing still, I said, and it was on the main line, then it was his absolute duty to do it, and it was a question of law for him to do it. That is what I said, if it was standing there on the main line.

(PALMER:) That isn't a question of fact for the jury, because there isn't any dispute about it. It is the duty of the court to charge as a proposition of law that the evidence in this case showed that train was standing there within the meaning of rule 99.

(COURT:) I don't believe, Judge, that there is a piece of evidence in this case tending to show that when it was stopped there, it was on the main line.

(PALMER:) Well the telegraph operator at Randolph testified that.

(COURT:) Note an exception to the judge.

(PALMER:) I want an exception to the definition of the court on the subject of mathematics, the present worth of this right of recovery.

(COURT:) What do you mean, I don't understand your exception, Judge. Just state it so we will know what your exception is.

(PALMER:) To the definition of the term "present worth" given by the court as applicable to the plaintiff's right of recovery. Now, I don't say that that isn't right, I want to look it up.

599 (W. AUSTIN:) I want to ask Judge Palmer what it is that he excepts to, and what he wants the court to charge this jury respecting the present worth, I want that on the record.

(COURT:) I have charged substantially as requested here.

(PALMER:) Well, if you did, and that is the law, why, I haven't any fault to find, but I didn't understand the application that you made to the mathematical——

(COURT:) I said $200. instead of the amount, to illustrate that, I simply illustrated this rule that I laid down here.

(PALMER:) I don't know that there is any error anywhere, but I thought I would like an exception amd I want to examine it, these are new questions.

(COURT:) Do you want me to withdraw my charge?

(PALMER:) No, I don't care whether you withdraw it or not.

(W. AUSTIN:) What do you claim is the present worth, and how do you claim it should be figured?

(PALMER:) I am not——

(COURT:) Let me ask the Judge, wherein do you claim the error in what the court said with reference to present worth?

(PALMER:) Well, I can't tell, I couldn't get what you said.

(COURT:) Well, then, we don't want to allow you an exception, we will allow you an exception if you will tell me wherein that I have charged upon that point, having charged as requested.

(PALMER:) Well, if you have charged as requested, why,
600 of course no exception would lie, but I didn't understand that you following the instructions, the request.

(COURT:) Yes, I followed that, certainly, only I made an illustration of $200. etc., it was right in accordance with the request.

(PALMER:) Well, of course I asked for the instruction, I didn't get the exact language of the court, I thought the subject was so well defined that——

(W. AUSTIN:) What do you claim ought to be told the jury about that?

(PALMER:) I am not telling what I claim, I can't define it myself.

(COURT:) Well, then, I won't allow an exception.

(PALMER:) Very well, that is all right, I am not trying to force anybody, but I thought the definition was erroneous, and I desire an exception, if I am not entitled to it, why let it go.

(COURT:) Well, if you will tell me wherein that I should charge different than I have charged, that would give me an opportunity to charge that as you want me to, but I shan't allow an exception, Judge, until you do that, because I am not required to.

(PALMER:) I am not saying that you are, I don't want to be offensive in the matter, I was simply asking for what I thought was my right.

601 (COURT:) I claim that is the right that I have.

(W. AUSTIN:) And I should think we would have a right to know that, too.

(PALMER:) Very well.

(COURT:) While the jury were here, I would like the chance to correct any error that I might see that I have made, even in following these requests.

602 *Supplemental Charge.*

(COURT:) I have said to you, Gentlemen of the jury, with reference to rule 99, that if you find that train 708 was stopped and delayed on the main track under circumstances in which it might be overtaken by another train, etc., that it was the duty of the plaintiff's intestate to get off and deposit the fusees and torpedoes for the protection of the rear of his train. Now, I used the word "and" instead of "or". I should have said, "when a train stops or is delayed, on the main line", and then told you that that question was a question of fact claimed one way by the plaintiff, and by the defendant the other way, they claiming that it was stopped so, that he didn't, that the intestate didn't deposit the fusees, and I told you it was the duty of the defendant to make that fact out by a fair balance of evidence, in order to hold the plaintiff was negligent in that particular instance. You may take the case.

603 *Defendant's Exception.*

(AMEY:) I have got a motion about the law with reference to the last statement of the Court, that is, the Court says that the burden of proof is shifted onto the defendant.

(COURT:) I didn't say it was shifted. I said it was for him to make out the fact.

(AMEY:) You said it was for the defendant to make out the fact. I am not sure about that, I have a doubt about it, that is, in my own mind, you know, I may not be right, and I want to take an exception to that part of it.

(COURT:) You object to it on the ground that the burden is not upon the defendant to show that he was negligent.

(AMEY:) Sure.

(COURT:) They have held in quite a recent case, you know, that that was a fact to be pleaded in the Federal Law.

(AMEY:) Well, I may be wrong about it.

(COURT:) Well, an exception may be noted on that ground that the burden was not upon them.

604 *Defendant's Requests for Instructions to the Jury.*

Now comes the defendant in the above entitled cause, and moves this Honorable Court to deliver the following instructions to the jury.

(1.) This action purports to be brought under the Federal Employer's Liability Law but the essential elements necessary to bring the action within that law have not appeared in evidence nor are they apparent in any way upon the face of the record.

(2.) None of the essential propositions for recovery or essential items of negligence on the part of the defendant, set out in the plaintiff's declaration, have been established.

(3.) There was no evidence introduced in said cause to show that the defendant company did not require its conductors, engineers, station-agents, train dispatchers and telegraph-operators to observe such rules and regulations as were then and there necessary for the safety of employees; nor was there any evidence introduced to show that the defendant did not suitably equip and construct its road and railroad station at Bethel, Randolph and Braintree and did not equip its station houses, buildings and signal boards of good and sufficient quality along its lines at Bethel, Randolph and Braintree; nor was any evidence introduced in said cause to show that the defendant did not operate and maintain said stations, station
605 houses and signal boards in a sufficient and secure manner; nor was there any evidence in this case to show that the defendant did not use proper skill in the selection and employment of servants or that it did not make proper rules and regulations and require employees to observe the necessary rules in the management and running of its trains; nor was there any evidence introduced in

this case to show that the defendant did not execute and deliver to station agents and operators along said line proper orders and directions for the running and passing of trains thereon; for the movement of engines, trains and cars from the despatcher's office at St. Albans. Nor was there any evidence introduced in this case to show that the defendant did not employ reasonably skilful and competent despatchers and operators to regulate and report the movement of trains; nor was there any evidence introduced in this cause to show that it has been in years the custom of this defendant to direct station agents, telegraph and telephone operators, conductors and engineers, as to the location of its trains going in the same direction along said railroad, or to inform and advise trains going along on said railroad in the same direction along said railroad, or to inform and advise trains going along on said railroad in the same direction of the location of each other; nor was there any
606 evidence introduced in said cause to show that the defendant failed to securely construct and maintain its engines, cars and trains; nor was there any evidence introduced in said cause to indicate that said defendant carelessly and negligently operated and maintained engine 708 at the time of this accident.

(4.) All the counts, except one, in the declaration allege a lack of knowledge on the part of the plaintiff's intestate, that any train was following or that his train might be in danger. This is an essential element of the declaration and must be proved; it has not been proved and, therefore, the plaintiff is not entitled to recover.

(5.) The rule of damages in the declaration purports to be governed by the law of the state of Vermont and recites the substance of the Vermont Statute Law now existing upon the subject of the Recovery of Damages. The declaration purports to be under the Federal Employers' Liability Law. One law for substantive recovery and another law for the distribution of damages cannot stand together in the same declaration, for by the Federal Law, the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the law of Vermont, the grandchildren would take it all, to the exclusion of the parents. By the Federal Law, in case there were no widow, or husband, granchildren
607 or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont law, the next of kin would receive as provided for the distribution of personal estate without regard to their dependency upon the deceased.

(6.) The evidence conclusively shows that the railroad company at the time of the fatal injury to the plaintiff's intestate, was operating under Standard Rules; that those rules are the most conducive to safety; that the plaintiff's intestate was killed because of a gross violation of these rules; that his sole negligence was the proximate cause of the injury,—hence the plaintiff can not recover.

(7.) The evidence shows that the Master was free from fault with reference to the care of engine 708.

(8.) This case is under the Federal Employers' Liability Law, but the declaration does not so state, and the replication purporting to be an amendment to the declaration, does not bring the matter

within the purview of this Federal Law, hence to render a verdict for the plaintiff under the pleadings as they now stand would be in violation of the Fourteenth Amendment to the Federal Constitution, which forbids the taking of property without due process of law and guarantees to everyone equal protection of the laws.

(9.) The evidence conclusively shows that engine 708 was reported to the Master for repairs; that repairs were made,
608 hence, so far as the condition of engine 708 on the morning in which the plaintiff's intestate received his fatal injuries, the defendant is free from fault.

(10.) It has been conclusively shown that the defendant company at the time the plaintiff's intestate received his fatal injuries, was operating under the Standard Rules, that they are in universal use throughout the country; that they have been adopted after careful investigation by the best railroad experts. The evidence shows also without dispute that these rules were not observed by the plaintiff's intestate at the time he received his fatal injury.

(11.) When a railroad company has deliberately adopted a system of Rules, which have been made familiar to its employees and its railroad is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the Court, because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient. There is no dispute but what Rule 99 and 91 are Standard Rules; that they were in force at the time of this accident; and the plaintiff so understood it; these rules have been established by the best railroad experts in the country,
609 and being the result of large experience of the best railroad authority from the undisputed evidence received in this case, and it having been stated without dispute that as a result of this experience, Rule 99 and 91 are safer than notice from stations on the line of the position of trains running in the same order, it was no negligence on the part of this defendant to run its two extras as it did in this case on the night of January 11 and morning of January 12, without receiving messages at different stations between White River Junction and the scene of the accident.

(12.) It was the duty of the plaintiff's intestate, under the rules in force at the time of the injury to have flagged by means of torpedoes and fusees train 708 to prevent its colliding with 401 at Randolph and to have put out fusees at intervals between Randolph and the place of the accident. This he did not do.

610 *Defendant's Additional Requests for Instructions to the Jury.*

Now comes the defendant in the above entitled cause, and moves this Honorable Court for the following additional instructions to the jury.

(1.) The amount of recovery in this case is not to be determined by the number of children of the deceased intestate, for whose fatal injuries this suit is brought.

(2.) The jury should find the actual earning power of the deceased and fix for this purpose an annual income and should in estimating damages take into consideration the expectation of life which is estimated to be thirty-three years, and should also consider that this money would not if he had lived, have been paid at once, but would have been paid from year to year, and the last annual sum would not be paid for thirty-three years hence.

(3.) Jury should take into consideration present worth of the fair annual compensation of the deceased, and should consider that an amount of money payable in thirty-three years from date or from his decease is not anywhere near of as great value as the same sum payable now.

(4.) Notwithstanding the jury may find that engine 708 was leaking steam so that the engineer could not see tail lights
611 of 401 at the time of the accident, if the proximate cause of the injury was the failure of the Flagman White properly to put out fusees and torpedoes according to the Company's rules, this plaintiff cannot recover.

(5.) If Flagman White disobeyed the rules of the company at the time he received his fatal injuries, the plaintiff cannot recover.

(6.) Even though the defendant was negligent, if Enoch L. White assumed the risk of his fatal injuries, plaintiff cannot recover.

(7.) If, when the train stopped at Randolph, Enoch L. White failed to put out fusees and torpedoes, according to the rules, he was himself negligent, and his negligence proximately produced his fatal injuries, regardless of whether he considered his train liable to be overtaken by another train or not.

(8.) In getting at comparative negligence, the jury should take into consideration the negligence of the defendant, and the negligence of the plaintiff proximately producing the fatal injuries and after finding the actual damage in this case, should reduce it by the amount that the negligence of Enoch L. White, the plain-
612 tiff's intestate, contributed to the fatal injuries received by him.

(9.) If Enoch L. White was two-thirds negligent, and the defendant company, one-third negligent, the defendant should pay only one-third of the assessed damages, or if the negligence of Enoch L. White was equal to the negligence of the defendant company, then the defendant company should pay only one-half. In other words, the defendant company should pay of the actual damage only that proportion to which its own negligence contributed.

(10.) The jury have nothing to do with the damages claimed in plaintiff's writ, and it should not be considered as any factor in the determination of the damages. It is as easy for the plaintiff to write twenty thousand into a writ as it is to write five thousand dollars, and what the plaintiff claims as damages should not influence the jury in any respect.

(11.) The probable length of Mrs. White's life has nothing to do with this case.

(12.) In making up the verdict, the jury should not take into

consideration the wrangles and debates of counsel or exceptions taken by either side, or the extent of the questions asked of jurymen by either the plaintiff or the defendant in making up the panel.

613 ST. JOHNSBURG, VT., Aug. 22, 1913.

I hereby swear that the foregoing 489 pages contain a verbatim transcript of my verbatim stenographic notes taken in the case of Mary Theresa White, Admrx. vs. The Central Vermont Railway, Co., tried at the March Term of Franklin County Court, 1913,—of the evidence, objections and exceptions by defendant, offers, motions filed, charge of the Court, etc. as appear.

Attest:

MARY J. NELSON, *Reporter.*

613½ Supreme Court. November Term, 1913.

MARY THERESA WHITE, Adm'r'x, of the Estate of Enoch L. White,
vs.
THE CENTRAL VERMONT RAILWAY COMPANY.

Opinion of the Supreme Court of Vermont.

614 Supreme Court, November Term, 1913.

MARY T. WHITE, Adm'r'x,
vs.
CENTRAL VERMONT RAILWAY CO.

The statement of the case should include the following:

The following is a copy of Form A Clearance Card with explanatory Note accompanying it, as appears in defendant's Book of Rules:

Form—(A.)

Central Vermont Railway Co.

Clearance.

June 5, 1911.

(B) 6.45 A. M.
Train No. 12.
I have orders (5-7 and 9) (Nil) for your train.
The next train ahead is (Extra 751) It left this station at 8.35 a. m., and arrived at (C) at 8.55 a. m. Signal is displayed for (Extra 576) (Block) and does not now affect you.

JOHN JONES,
Operator.

This does not affect any train orders you may have received.
Conductors and Engineers must each have a copy, and see that their train is correctly designated in the above form.

NOTE:—The numbers of orders for the train must be filled in in figures. When there are no orders the word "nil" must be written in. If the next train ahead has not reached the next telegraph office the words "not yet" must be written in the blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type. Operators must keep the lowest copy.

Where the Automatic Block Signals are in service instead of Station Block the information relative to the train ahead may be omitted.

(Print on green paper.)

615 Supreme Court, November Term, 1913.

MARY T. WHITE, Adm'x,
vs.
CENTRAL VERMONT RAILWAY CO.

Present:

Powers, C. J.; Munson, Watson, Haselton, and Taylor, JJ.

WATSON, *J.*:

This is an action on the case, claimed by the plaintiff to be under the Federal Employers' Liability Statute, but by the defendant to be under the State law, to recover for personal injuries resulting in the death of the plaintiff's intestate, Enoch L. White, on the 12th day of January, 1912. The declaration contains several counts, but in the respects essential to be noticed in disposing of this question, the allegations of all the counts are substantially alike, and may be stated with sufficient definiteness for this purpose as follows: that prior to and on the day named above, the defendant corporation was the owner and operator of a certain railroad, extending from St. Johns in the Province of Quebec in the Dominion of Canada, to and through the City of St. Albans, in the State of Vermont, and through the towns of Braintree, Randolph, and Bethel to White River Junction in said State, and in connection with other lines of railroad to and through other states, was then and there engaged in commerce between several states, and between the State of Vermont and the Dominion of Canada, as a common carrier; that on the day aforesaid the intestate was engaged in the defendant's employ on its railroad as a freight brakeman, and that while thus engaged, at a certain point between the stations of
616 Randolph and Braintree, solely by reason of the carelessness and negligence of the defendant, its agents, servants, and employees, a collision between two of the defendant's freight trains occurred, and the said intestate by means thereof and solely by reason of the negligence of the defendant, its agents, servants, and employees, and without fault or contributory negligence on his part, while in the performance of his duty as brakeman on one of

said trains, was instantly killed. The allegations further show that the intestate left surviving him a widow, then pregnant, and minor children including the one yet unborn but subsequently born alive, and that this suit is brought by the personal representative of the intestate for the benefit of said widow "and next of kin minor children, under and by virtue of the statute and laws in such case made and provided."

None of the counts contain averments showing that the train on which the intestate was engaged at the time of his injury, was being operated in interstate or foreign commerce, nor that he was then employed by the defendant in such commerce, without which character of his employment there could be no right of action under the Federal Employers' Liability Act. Mondou v. New York, New Haven and Hartford Ry. Co., 223 U. S. 1, 56 L. ed. 327; Pedersen v. Delaware, Lackawana & Western Ry. Co., 229 U. S. 146, 57 L. ed. The defendant pleaded in bar, expressly alleging, among other things, that at the time of the happening of the several things in the plaintiff's declaration mentioned, the defendant was and ever since has been a common carrier by railroad engaged in commerce between the State of Vermont and the State of Massachusetts and the State of Connecticut, and between the State of Ver-
617 mont and the Dominion of Canada, and that at the time the plaintiff's intestate received the injuries complained of in the declaration, he, the intestate, was employed by the defendant, common carrier as aforesaid, in such commerce. The plaintiff replied precludi non, because, etc., iterating the said allegations in the defendant's plea, and averring that by the laws and statutes of the United States and of the State of Vermont, the court has full and complete jurisdiction of the matters and things set forth in the plaintiff's declaration to determine according to law,—concluding to the country.

Defendant demurred to the replication, because (1) it is no answer to the defendant's plea; (2) it is a complete departure from the writ; (3) it introduces a new cause of action not contemplated in the declaration; (4) it does not support or fortify the declaration; (5) it does not present matter of estoppel to defendant's plea; (6) it does not traverse the plea; (7) it does not confess and avoid the plea; and (8) the declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the Federal Employers' Liability law.

On hearing, the demurrer was overruled and exception saved. Thereupon a jury was empanelled, and a trial had, resulting in a verdict for the plaintiff, and judgment was rendered thereon. By thus pleading over and going to trial upon the merits, the defendant waived its demurrer. German v. Bennington & Rutland R. Co., 71 Vt. 70, 42 Atl. 972.

After verdict, the defendant undertook, by motion in arrest of judgment, to raise the same legal questions respecting the declaration with reference to the Federal Employers' Liability law, as
618 were presented on the demurrer, though some of the assignments were somewhat different in from, one being that the

declaration purports to be under the said Federal statute, but contains no allegation that the defendant was engaged in interstate commerce at the time of the injury to the intestate, nor that the intestate was then and there engaged in the promotion of such commerce, and excepted to the overruling of the motion. The rule is, however, that after judgment on demurrer by solemn determination, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer. 2 Tidd's Pr. 918; Edwards v. Blunt, 1 Str. 425; Ross v. Bank of Burlington, 1 Aik. 43, 15 Am. Dec. 664. Moreover, though the declaration lacks averments showing that the intestate, at the time of his injury, was employed by the defendant in interstate or foreign commerce, yet not only was the declaration aided in this respect by the defendant's expressly averring in its plea in bar the facts omitted from the declaration and essential in order to set forth a good cause of action under the Federal law (Ralston v. Strong, 1 D. Chip. 287; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526), but the matter replied by way of departure,—if it was a departure, a question we do not decide,—would have been a sufficient answer, in substance, to the defendant's plea, had the plaintiff pleaded it in the first instance, and the verdict in favor of the party who made the departure cured the fault. The only mode of taking advantage of a departure is by demurrer, and since the defendant instead of standing upon its demurrer, took issue upon the replication containing the departure, and it being found against the defendant, the court will not arrest the judgment, for after such finding it necessarily ap-
619 pears on the whole record that the plaintiff is in law entitled to judgment. Lee v. Raymes, Sir. T. Raym. 86; 2 Saund. Pl. & Ev. 807; 1 Chit. Pl. 648; Gould's Pl., Ch. VIII, Sec. 79; Stevens' Pl. 147; Farmers & Mechanics Bank v. Flint, 17 Vt. 508.

It follows that since by its plea in bar the defendant expressly supplied the omission in the declaration, essential to a good cause of action under the Federal law, and since issue was joined on the replication departing (defendant asserts) from the declaration accordingly, the defendant's objection to the introduction of any evidence because the declaration does not state facts sufficient to constitute a cause of action under that law, was properly overruled.

The deposition of W. E. Lamson was used by the plaintiff. The deponent, the undertaker who prepared the body of the intestate for burial, testified to being at the scene of the accident soon after the collision. On being asked where he found the body of the intestate, he answered, subject to defendant's exception on the ground that damages for pain and suffering were not claimed. "Right up in front of the engine, on the pilot, you might say seemed to be crowded up there." It is argued that the words "crowded up there" mean pain and suffering. But this is not so when the answer is considered, as it must be, in connection with the question asked.

It appeared that the freight train on which the intestate was engaged when killed was No. 401, hereinafter designated as 401, running extra northerly from White River Junction, and that with it collided freight train No. 708, hereinafter designated as 708, also

running extra from the same place and in the same direction.
620 The railroad is a single track. During the direct examination of L. O. Gibbons, the conductor of 401 at the time of the accident, he was shown a paper marked plaintiff's exhibit "C," and various questions were asked him by way of identification of the paper as a copy of a running order out of White River Junction. These questions were objected to on the ground that there had been no showing that it was the paper the witness had on the night of the accident, that the defendant had no knowledge as to its source, and that the loss of the original had not been shown. Such evidence was received subject to defendant's exception. Upon that evidence and the evidence relating to the loss of the original and search for same, the court found that the original was lost, that the witness had made all reasonable search for the same in the places where it was likely to be found but was unable to find it, and that "C" was a copy thereof. All this appearing, "C" was received in evidence subject to defendant's exception upon the grounds stated. The bill of exceptions further states that substantially the same appeared with reference to plaintiff's exhibits "D" and "E," as appeared with reference to "C," and the same objections and rulings were made and exceptions taken. The transcript of the evidence is before us for the purpose of showing the tendency of the evidence and is to control. A careful examination of the evidence shows the court's findings to have been warranted, and the three exhibits were properly admitted.

During the examination of the same witness, plaintiff offered in evidence Rule S-71 of Defendant's Rule Book, which was objected to as immaterial. On being asked by the Court to state his offer, plaintiff's counsel stated at some length their claim in that
621 behalf, concluding by saying he did not want an exception if he could avoid it. Defendant excepted to the offer made in the presence and hearing of the jury "because the plaintiff's attorney has been testifying," also excepted to the remarks of the attorney. Plaintiff's counsel, being requested by the court, had a right to state his offer to prove such facts as were thought to be material to the case (Chicago, etc., R. Co. v. Fietsam, 123 Ill. 518. 15 N. E. 169); and the court could permit him, within proper bounds to state the grounds upon which he relied as justification for the offer to which opposing counsel objected. Gilbert v. Michigan Cen't R. Co., 116 Mich. 610, 74 N. W. 1010. Nothing appears of record showing that the attorney, in making the offer and stating the grounds therefor, exceeded legitimate action. Yet to guard against harm resulting to the other side, the court, on exception being taken, told the jury that they should not consider at all, in determining any issue in the case, what the counsel had just said to the court, that it was not directed to them, but to the court. No harm could have resulted to the defendant.

The plaintiff's attorney offered Rule 324 which reads as follows: "Operators are required to keep a record of the time trains pass their stations; and be prepared to furnish information promptly to those that should receive it," the attorney stating, "We are going

to show that at Bethel the operator had a record of the time 401 passed there, or rather that he ought to have had a record under this rule,—it was his duty to have a record of the time 401 passed there,—and that he ought to have informed himself of the approach of 708 to be prepared to furnish information to 708; and expect to show that when 708 got its clearance card at Bethel this
622 operator drew a dash through the space where the rule says he must tell them when 401 left that station, and knowing that that train was between Bethel and Randolph at that time and ony 21 minutes away he gave him no information at all, omitting it from the clearance card." The rule was admitted in evidence against defendant's objection and exception on the ground that it was incompetent, irrelevant, and immaterial. In the defendant's brief, the only point made under this exception is that "The hypothesis upon which the question was asked is correct. There is nothing in the statement of facts to warrant the assumption that 'The rule says he must tell them when 401 left that station.' 'The rule does not so state." This ground of the exception was not stated in the court below, and it is not considered.

Wm. L. Wright, who was the conductor of 708 on the night of the accident, testified that he received a 19 order at Bethel, and that he delivered the order to the engineer of the train, and after making the order complete the train proceeded; that with this order he received a clearance card, and a copy of the same was there given to the engineer, but it did not contain a report of any train ahead. Against the objection and exception of the defendant on the ground that rule 221 did not apply in the circumstances of this case, the witness was allowed to testify that there was no notice to him on this clearance card, according to rule 221 and Form A, that the next train ahead was 401, and of the time it left Bethel. It is said in argument that rule 221 was in force, but that the situation on the occasion in question was governed by rule 91, which it is said does not require any notice in the Clearance Card of the freight train ahead when there is another freight train following,
623 if the forward train has been gone five minutes. This involves the construction of those two rules, as applied to the conditions shown by the evidence. Train 401 consisting of low-wheeled engine 401 drawing eighteen loaded and sixteen empty freight cars, and train 708, consisting of engine 708, high-wheeled and faster than engine 401, drawing twelve loaded and twenty-two empty freight cars, were both sent out from White River Junction, destined for Roxbury. Train 401 left White River Junction at 6 o'clock P. M. and 708 at 10:12 o'clock P. M. By reason of delays on the road, 401 did not stop at Bethel until 11:52 P. M. It took water there and left at 12:15 A. M., arriving at Randolph at 12:50. It received a 19 order there stating that No. 6, which was an opposing passenger train, would run so many minutes late. Train 401 left Randolph at 12:54, and arrived at the place of the accident, 1 4/5 miles farther on, at 1:07 A. M. Train 708 arrived at Bethel at 12:30 A. M., where the train order signal was out. There the train received orders and a clearance card, form

A, as stated above, and left at 12:36 A. M., passed Randolph at 1 o'clock without stopping, and arrived at the place of the accident at 1:07 A. M. The evidence tended to show that during this trip those in charge of 708 had no knowledge and received no notice or warning of 401 on the track ahead.

Automatic block signals were not in service on defendant's railroad, but station block signals were. Rule 91 is as follows:

"Unless some form of block signal is used, trains in the same direction must keep at least five minutes apart, except in closing up at stations, but a train must not follow a train carrying passengers or operating a snow plow until a report is received of its arrival at a station ahead, except that a train may follow twenty min-
624 utes after the departure of a train carrying passengers or operating a snow plow, when either the station from which it is to follow or the next station ahead is not a telegraph station, or when communication with the train dispatcher is interrupted, and the wire failure is noted on the clearance.

"The train order signal will be used by operators to maintain the intervals required by this rule.

"Schedule speed must not be exceeded by sections of trains other than the first section, nor may a train following a train carrying passengers, exceed the schedule speed of such train unless clearance shows arrival at a station ahead."

And Rule 221:

"A fixed signal must be used at each train order office, which shall indicate 'stop' when trains are to be stopped for train orders. When there are no orders, the signal must indicate 'proceed', except as provided in Rule 91.

"When an operator receives the signal '31' or '19' followed by the direction, he must immediately display the 'stop' signal for the direction indicated, and then reply 'stop displayed', adding the direction; and until the orders have been delivered or annulled, the signal must not be restored to 'proceed' except by train order.

"A train stopped by a train order signal must not proceed without a clearance card Form 'A' or a caution card Form 'C', although train orders may have been received." This rule contains a further paragraph, not material here. A copy of the blank "Form A", clearance card, prescribed by the defendant's Book of Rules, and of the explanatory note accompanying it therein, appear in
625 the statement of the case.

Since this case in no wise pertains to a train carrying passengers or operating a snow plow, the two rules quoted will be considered solely with reference to freight trains. Rule 91, relating to the movement of trains where no form of block signals is used (as in the case before us), provides that trains in the same direction must keep at least five minutes apart, except in closing up at stations, and that to maintain such interval, operators will use "the train order signal." By rule 221 this same signal must be used at each train order office, and shall be made to indicate "stop", when trains are to be stopped for train orders, and when there are no orders the signal must be made to indicate "proceed", except as provided in

Rule 91, which exception means, as we have seen, when the operator is required by the latter rule to stop a train in order to maintain the required interval between it and the preceding train in the same direction. By rule 221 when a train is stopped by a train order signal, whether it be for train orders under that rule, or to maintain the interval as required by Rule 91, it "must not proceed without a clearance card Form 'A' or a caution card Form 'C', although train orders may have been received." That this construction is in accordance with the contemplation of the defendant's operating rules is seen by referring to blank "Form A" clearance card therein, with the explanatory note. Blank spaces are left to be filled in and concerning them the note says: "The numbers of orders for the train must be filled in in figures. When there are no orders the word 'nil' must be written in. If the next train ahead has not reached
626 the next telegraph office the words 'not yet' must be written in the blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type. Operators must keep the lowest copy. Where the Automatic Block Signals are in service instead of Station Block the information relative to the train ahead may be omitted." The conductor and engineer must each have a copy. The only exception mentioned in the note, to the requirement of information relative to the train ahead, is when Automatic Block Signals are in use. If intended to exclude such requirement as to freight trains, scheduled or extra, it should seem most natural to indicate such intention in connection with the exception made. We think no such exclusion was contemplated, and we hold that Rule 221 was applicable in the circumstances of this case, and that a compliance therewith required the clearance card to train 708 at Bethel, to be filled in to show the next train ahead (No. 401), the time when it left the station at Bethel, and that it had not yet arrived at Randolph. The blank spaces provided in that form of clearance card to be filled in with such information were not filled out at all, a dash being made in each such space instead.

The witness Wright, conductor of train 708 on the night in question, called as a witness by the plaintiff, having testified in examination in chief, that he received an order and clearance card at Bethel; that there was no stop after leaving Bethel, and he had no notice whatever that train 401 was ahead of him; that he did not believe he was going to meet a freight train between Ran-
627 dolph and Braintree; that he was running between twenty and twenty-three miles an hour; that he saw no tail lights of 401 at any time before hitting that train, and had no warning or notice of any kind that 401 was ahead of him; and that there was a straight track above Randolph back from the scene of the accident for about half a mile, was asked in cross-examination, "Q. And supposing you were delayed on sidings and after you got back on the main line, a lot of time is lost, how do you protect your rear end?" It was not error to exclude the question as not cross-examination.

One Beeman, called by plaintiff, having testified that the intestate had rented a house of him for nearly three years, was asked,

"Q. And after renting it, did you, previous to his death, make a contract of sale of the house and property to him?" The witness gave a long answer, some of it responsive to the question and some, not. Defendant moved to strike out the answer on the ground that it was not responsive, too involved, and a part of it immaterial. On being asked what part of the answer it desired to have stricken out, the defendant said the whole of it as not responsive to the question. The answer being responsive in part, no error was committed in overruling the motion.

Against the objection of immateriality, plaintiff was permitted to testify that the intestate was a member of a church, as indicating the moral training and discipline and influence which would have been received from him by his children. We think this was proper evidence to be considered by the jury in determining the pecuniary damages occasioned by his death. Michigan C. R. Co. v.
628 Vreeland, 227 U. S. 59, 57 L. ed.; Tilley v. Hudson River R. R. Co., 29 N. Y. 252, 86 Am. Dec. 297; McIntyre v. New York Cent. R. R. Co., 37 N. Y. 286; Board of Commissioners v. Legg, 93 Ind. 529; Opsohl v. Judd, 30 Minn. 128; Illinois, etc., R. R. Co. v. Weldon, 52 Ill. 290; Baltimore, etc., R. R. Co. v. Wightman's Admr., 29 Gratt. 431.

L. O. Gibbons, the conductor of train 401, was called by the defendant, and testified in direct examination that the intestate was sitting in front of the stove in the main body of the caboose lighting his pipe when last seen by the witness after leaving Randolph. The purpose of this testimony was to show that the intestate was acting improperly at the time of the accident. To rebut this reference, the plaintiff asked the witness in cross-examination if he did not state in writing as follows: "We were doing all I thought necessary and proper to do on that occasion, he was in the line of his duty as well as myself, and other men of the train, and it was not the fault on my part or the part of Mr. White (intestate) that caused the collision." Defendant objected on the ground that the writing had not been shown to be signed by the witness. Yet the witness had testified that he signed it. The further question to the witness, "Did you intend to say at that time what I have read to you here?" was objected to on the ground that it was a conclusion. The witness answered, "Yes". The question called for a fact, not a conclusion, consequently the objection made is without force.

The defendant called one J. E. Maun as a witness, and having qualified him as an expert on Railroad Rules, asked him what duty rule 91 imposes upon the rear brakeman, the defendant claiming it was entitled to the opinion of an expert upon the rules.
629 The question was excluded and exception saved. The construction of this rule, if material, was for the court, and while experts may be called to define terms of art, to explain the principles of their science, where such principles are necessary to be understood, to state the condition and practice of their business, when material, they cannot as witnesses be permitted to instruct the court as to the meaning and legal construction of a written instrument, nor to give their opinion thereon. Corning v. Burden, 15 How.

252, 14 L. ed. 683; Winans v. New York & Erie R. R. Co., 21 How. 88, 16 L. ed. 68; McIsaac v. Northampton, etc., Co., 172 Mass. 89, 70 Am. St. Rep. 244, 51 N. E. 425; Fuller v. Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4; Pratt v. Dunlap, 85 Conn. 180, 82 Atl. 195.

Defendant called as a witness one Preston and showed by him that he had been a locomotive engineer for twenty-four years; that in November and a portion of December, 1911, he ran engine 708 between St. Albans and White River Junction; and that she was an "A-numner-one" engine. In cross-examination the witness testified to booking on the 21st day of the latter month, "pack the right valve stem", because that valve stem was leaking, and further testified to booking, "pack under stem joint", because it needed it. Plaintiff's attorney then offered to show that certain repairs were reported necessary on this engine by the witness on the 14th, 18th and 21st of December. In making the offer the attorney said: "We offer to show this leaking of steam on the 21st of December,—on the 18th of December,—in other words, these engineers, both of them, have testified that when an engine was out of repair they booked it and they relied on these books to fix their mem-
630 ory about it, and in cross-examination I have referred to these books because they referred me to them." The question was waived, and an exception was allowed the defendant to the making of the offer, on the ground stated, "It has all gone to the jury from Mr. Austin." It does not appear that the attorney in making the offer acted in bad faith, nor that he said anything improper within the hearing of the jury, and presumptions will not be made in support of the exception.

Nor was it error to allow, subject to defendant's exception on the ground that the evidence was incompetent and immaterial, the same witness to testify that engine 708 was leaking from the right valve stem on the 21st of December, when he came in; nor, that on the 18th of the same month she was leaking from "that right by-pass head." In neither case was the testimony outside of the scope of proper cross-examination.

One Kramer was called by the defendant as an expert on rules and on the operation of railway trains on the road. In cross-examination he was asked whether the defendant company operated trains by block signals, and against the objection of incompetency and immateriality, the witness answered that it did not, as far as he knew. In view of the form of clearance card A and the explanatory note accompanying it in defendant's Book of Rules, already noticed, the evidence objected to cannot well be said to be immaterial, and how it was incompetent has not been pointed out. Evidence of the same fact was introduced by both parties.

The defendant offered to show by its witness, one Fitzsimons, an expert on engines, and a master mechanic, as follows: "We would like to show that under the Federal law those engines all are
631 frequently inspected and that this (No. 708), among the others, was inspected prior to the time when it was used on this occasion and was found all right." This offer includes not

only engine 708, but engines in no wise connected with this case. As to the latter, the evidence was not admissable, consequently the whole was properly excluded. Vaillancourt v. Grand Trunk Ry. Co., 82 Vt. 416, 74 Atl. 99.

At the close of the evidence defendant moved for a verdict on ten different grounds, numbered from 1 to 10 consecutively. The different grounds will be referred to and considered by number, but not in their order. Numbers 2 and 9 are based upon the claimed omissions of necessary averments in the declaration to entitle the plaintiff to recover under the Federal Employers' Liability statute. In legal effect these are disposed of by our holdings on the demurrer and on the grounds considered of the motion in arrest of judgment, and need not be further noticed.

The grounds of numbers 4, 5, and 6 are that of contributory negligence by the intestate. Under the Federal statute, contributory negligence by the servant does not defeat the action. It affects the question of damages only. By section 3, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, as compared with the combined negligence of himself and the employer. Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 57 L. ed.

Ground No. 10 is, that there is no evidence in the case
632 showing the train upon which the intestate was killed to have been engaged by the defendant in interstate commerce, nor that at the time of the accident the intestate was employed in such commerce. Under the pleadings neither of these facts was in issue. They stood as judicial admissions by both parties, by the defendant in its plea, by the plaintiff in her replication, and thus they were outside the range of evidence either to establish or dispute. Wig. Ev., Secs. 1064, 2589; Paige v. Willett, 38 N. Y. 28; Tisdale v. President, etc., D. & H. C. Co., 116 N. Y., 416, 22 N. E. 700.

Ground No. 1 is, because upon all the evidence in the case the plaintiff is not entitled to recover, and No. 3, because the evidence shows the defendant free from fault. The evidence tended to show that previous to the night in question considerable trouble had been had with engine 708 by reason of its frequent leaking of steam beyond that usually expected from engines in proper condition, so much so that on several occasions within a month before the accident, it had been booked for repairs in this respect; that on the night in question it leaked steam very badly about the steam chest and piston rods before leaving White River Junction, so much so that when the engineer directed a brakeman to get onto the pilot of the engine to line up the switches, he had not been able to see because of the escaping steam; that after leaving White River Junction, the escaping steam was so dense about and over the engine that a person on the seat of the fireman or of the engineer in the cab could not see forward by the engine, and that this condition continued all the way to the place of the accident; that because of such escaping steam when the train left Randolph, and up to the time of the collision,

they could not see the tail lights of train 401, though the
633 evidence tended to show they were all lighted and that the track was straight the last half of a mile or more. Whether the engine's thus leaking steam was consequent upon the defendant's neglect to keep it in suitable repair was a question for the jury. With this question answered in the affirmative, such negligence was a proximate cause of the accident. Again, the evidence tended to show that, owing to the difference in the size of the wheels, engine 708 was faster than engine 401, and so steadily and rapidly gained upon her the night in question, that, with the delays of the latter, when train 708 stopped at Bethel train 401 had not reached Randolph, 7.1 miles away. It is said in Louisville, etc., R. Co. v. Heck, 151 Ind. 292, 60 N. E. 988, that "a railroad company is legally bound to know, and therefore, in law, it does know, the whereabouts of all its trains," but in disposing of the case before us it is not necessary to consider this presumption; for respecting the night of the collision the evidence showed that the train dispatcher, through reports required by the rules of the company to be given him propmpty by the telegraph operators at the different stations on defendant's line of the time of arrival and departure of all trains, was informed of the positions of these two trains as they proceeded north from White River Junction to the place of the accident. Having such information, the train dispatcher knew that. when 708 left Bethel 401 was less than 7.1 miles ahead, and he must have known that as the two trains were proceeding it was inevitable that the rear train would shortly overtake the other, unless steps were seasonably taken to prevent it; and being vice principal, his
knowledge in these respects was the knowledge of the defend-
634 ant. Therefore it cannot be said as a matter of law that, in the circumstances shown by the evidence considered most strongly in favor of the plaintiff, including the inability of those in charge of the rear train to see ahead because of escaping steam, the defendant so dealt with the preblem before it as not to expose the intestate to perils against which he might have been guarded by the exercise of the requisite degree of care on its part. In the absence of any notice by the defendant at Bethel or Randolph to those in charge of train 708 concerning train 401, with such instructions
as were reasonably calculated to prevent a collision, a jury
635 might well say that the defendant did not take such care to protect the intestate from accident as the exigencies of the situation required. Sheehan v. New York C. & H. R. R. R. Co., 91 N. Y. 332.

The seventh and last ground of the motion: "Because the declaration states that the plaintiff's intestate was injured by a cause of injury unknown to him, that he did not know and comprehend the danger in which he was placed at the time he received his fatal injury, while the evidence does not show that, hence the plaintiff has fallen short of the allegations in his declaration in a vital and material matter." It is a sufficient answer to this to say that the bill of exceptions states that the plaintiff's evidence tended to show that during the trip the intestate had no notice or warning of any

kind whatever that 708 was following; and the evidence, on examination, warrants this statement. The evidence further tended to show that train 401 running at the time of the collision about twelve miles an hour, and that the speed of 708 was then from twenty-two to twenty-four miles an hour, while the average rate of speed for extra freight trains was from ten to fifteen miles an hour. The motion for a verdict was properly overruled.

Defendant made twelve requests to charge. It excepted to the charge as follows: "For the failure of the court to charge as requested in original requests No-. 1 to 12 inclusive, and for failure to charge as requested in additional requests Nos. 1, 5, 6, 7, and 11, and the exceptions were allowed severally so far as the charge did not comply with said requests, and so far as said requests were material, and stated a correct proposition of law; because the
636 court omitted to say," etc., particularly specifying certain omissions to charge, and parts of the charge given.

These exceptions other than those particularly specified are too general for consideration. Those so specified will be considered in their order.

(1) "Because the court omitted to say, that if the jury found 708 defective, but that that defect was not the proximate cause of the injury, then the defective condition of 708 would be eliminated from the case." This exception cannot be sustained. We have already seen that the defective condition of that engine by way of leaking steam was one of the circumstances to be considered by the jury in determining whether the defendant was guilty of negligence in not notifying train 708 concerning train 401, with such orders as might reasonably be necessary to prevent a collision. Hence the defective condition of engine 708, though found not to be the proximate cause of the accident, would not by reason thereof necessarily be eliminated from the case.

(2) To what the court said, that "if the jury found that the defendant followed the rules, but there was a better way, then the defendant still might be negligent." This exception points to the latter part of the following paragraph in the charge:

"The defendant, as well as the plaintiff, has used as evidence in this case, some of the rules of the defendant company, tending to show that the defendant was following those rules at the time of the accident, and that those rules were such as were in general use by railroads throughout the country. They have been denominated in the course of the trial as general rules. If you find such to be the fact, that would be evidence tending to show that the defend-
637 ant was operating the train at the time of the accident in a prudent manner, if you find that he (it) was following those rules and adhering to them, but if the conditions were such on the occasion of this accident that a prudent man ought and would have foreseen the accident might and probably would happen, if those rules were followed, it would be negligence on the part of the defendant to follow them if there was any reasonable way in which to operate train No. 708 for it to avoid such accident."

With the latter part of this portion of the charge the defendant

has no reason to complain. It is held in an earlier part of this opinion that rule 221 was applicable to train 708 when it stopped at Bethel and that by the requirements thereof the clearance card given to that train should have been filled in to show the time when the next train ahead (No. 401) left Bethel and that it had not yet reached Randolph. By the undisputed evidence the clearance card was not so filled in. Consequently thenceforward the defendant, in operating train 708, was not following the rules and adhering to them.

(3) "To what the court said when he said it was the plaintiff's duty to determine whether the train was making the speed required, whether the train was liable to be overtaken by another train, upon the ground that the rules are positive about that, and there was no room left for discretion under the circumstances on the part of the plaintiff's intestate." One of the defendant's requests to charge was, "It was the duty of the plaintiff's intestate, under the rules in force at the time of the injury to have flagged by means of torpedoes and fusees train 708 to prevent its colliding with 401 at Ran-
638 dolph and to have put out fusees at intervals between Randolph and the place of the accident. This he did not do." In charging upon this subject the court told the jury they were to determine what the duty of the intestate was for the protection of train 401, and this duty, as claimed by the defendant, was largely to be gathered from its rules. The court proceeding:

"Rule 36 provides as follows: 'A red or yellow fusee, as the case may require, will be used for protection of a train which is not making the speed required by schedule or train order, and is liable to be overtaken by a following train.' We construe that rule to mean that it was the duty of the plaintiff's intestate, as rear brakeman of that train, to put out a fusee when certain conditions existed, and the rule being a command to him, that it was his duty to determine that question, that is, it was his duty to determine whether train 401 was making the speed required by the train order, as there was no schedule time, and that also he was to determine whether it was liable to be overtaken by a following train. If the train was not making the speed required by the train order, and that train was liable to be overtaken by a following train, and he as a careful and prudent man ought to have known that, then it was his duty to put out fusees between Randolph and the place of the accident, but before he was called upon to do this, these conditions must have existed, that the train was not making the speed required by the train order and that he, as a prudent and careful man, knew or ought to have known that the train was liable to be overtaken by a following train."

The effect of this charge was to place the responsibility of protecting the rear end of train 401 upon the intestate, if the train
639 was not making the speed required by the order and was liable to be overtaken by a following train. So far the charge was in substantial compliance with defendant's request, and no exception was taken thereto. The further charge in connection therewith that the determination of whether such conditions as to speed

of the train and liability of being overtaken by a following train as by the rule to require such protection, was with the intestate upon what he as a careful and prudent man knew or ought to have known, was but the legal consequence of the preceding part of the charge in accordance with defendant's request and not excepted to. The care and prudence of a careful and prudent man in like circumstances has so often been laid down as the rule of diligence required, that citation of authorities is unnecessary. It necessarily follows that with the latter part of the charge thus given the defendant can have no reasonable ground of complaint.

(4) "To the construction which the court placed upon rule 99, wherein the court said, 'If a train is stopped and delayed on the main line,' and "to what the court said about rule 99, because the rule conveys the fact that when a train is stopped on the main line it is an absolute duty under all circumstances for the flagman to protect his rear by fusees and torpedoes." Following the taking of these exceptions, the court gave a supplemental charge on the same subject, to which no exception was saved, thus curing the defect, if any there was, in the original charge.

(5) "To the charge of the court where it said in substance that plaintiff's intestate claims that the defendant had no right to run engine 708 in the condition it was, if the jury so found she would be entitled to recover." The part of the charge to which this refers was:

640 "The plaintiff claims that her intestate did all on that occasion that his duties under the rules and under his employment required, but that because of the negligence of the defendant, as claimed by her, this accident occurred and her intestate lost his life. She claims further that although you (the jury) might find that the defendant was following these rules on the occasion in question, that because of the condition of engine No. 708, the defendant had no right to run train No. 708 as it did run it, and that it had no right to follow those rules in view of the condition of engine No. 708 leaking steam as she claims it did. If she has made out those claims by a fair balance of the evidence, and the claims which she makes before you, then she is entitled to recover although you may find that her intestate was also negligent and that that negligence contributed to his death."

It is said in defendant's brief that there was no further charge with reference to proximate and remote cause. Considering this part of the charge, as it should be, in connection with what the court had already instructed the jury, it is not subject to the criticism made. The court had previously charged that in order for the plaintiff to recover, not only must she establish that the defendant was negligent, but she must also establish that that negligence proximately contributed to the death of her intestate, or was the proximate cause of it; that the burden was upon her to make out a cause of action against the defendant; that "She claims that the defendant was negligent in the operation of train drawn by engine No. 708," etc.; that it was the duty which the defendant owed to the intestate and all the other employees on train 401, to operate train 708 in

a careful and prudent manner, as it would have been man-
641 aged by a careful and prudent man, so as not to do injury to its servants on train 401; that it was not enough to prove that the accident happened, but the question for the jury to determine was whether the defendant was negligent, and whether that negligence proximately contributed to the death of the intestate, or was the proximate cause of it. Then follows:

"The plaintiff claims that the negligence of the defendant, which caused the death of her intestate, was the running of train No. 708 with its defective engine; that it never should have run that train from the station at White River Junction; that it was negligent in that it did not give such warning to train No. 708 and train 401 as it ought to have given in the circumstances of the case, in consideration of the condition of engine No. 708; that engine No. 708 was not in proper condition and was not suitably and properly equipped, and to recover in this suit, she must make out this negligence which she claims."

In giving the part of the charge complained of, it was not necessary for the court to repeat in detail all the elements it had before stated as necessary for the plaintiff to establish in order to entitle her to recover, and particularly so, since the negligence claimed by the plaintiff regarding the defective condition of engine 708, and the running of her in such defective condition, was alluded to by the court in connection therewith. There is not the slightest ground for doubt that the court intended that the portion of the charge of which complaint is here made, should be considered in connection with that which had gone before, as above indicated, nor is there any doubt that the jury so understood it. The exception is not sustained.

642 (6) "To the failure of the court to charge about the contingencies of illness and loss or impairment during the period of life, and also the contingency of death prior to the time limit of expectation." Evidence was introduced showing the intestate's age at death, his previous condition of health, his habits, earning capacity, etc., together with the expectancy of life of a man of his age, according to the American Experience Table of Mortality. On the question of damage the court charged, among other things, as follows: "In determining what he (intestate) is worth to the family, you should consider his actual earning power, and you should take into consideration his power to earn for the length of time that he may be expected to live," etc. Thus under the charge the jury were to consider the intestate's earning power during the term of life expectancy, which consideration involved the probabilities as to his health and physical condition. We think the charge was sufficiently explicit in this respect. See Baltimore, etc. R. R. Co. v. Wrightman's Adm'r, before cited.

(7) "To the charge that the burden was on the defendant to show that the intestate was negligent in not depositing torpedoes and fusees in rear of his train." The portion of the charge here challenged was in effect that on the question of the intestate's contributory negligence the burden of proof is with the defendant. It is

said by defendant that under our holdings it devolved upon the plaintiff to show the intestate free from fault. There can be no question but that the rule in this State in action for negligence based upon State law is as stated by the defendant. This case, however, is brought upon an Act of Congress regulating the liability of employers engaged in interstate or foreign commerce for
643 injuries received by their employees while engaged in such commerce, and it supersedes the laws of the State in so far as the latter cover the same field. Mondou v. New York N. H. & H. R. Co., cited above. Consequently the question of the burden of proof respecting contributory negligence on the part of the injured employee is to be determined according to the provisions of that Act, and the declaration of the Supreme Court of the United States thereon controls. In Seaboard Air Line Ry. v. Moore, 113 C. C. A. 668, 193 Fed. 1022, this burden was charged to be with the defendant, and on writ of error the judgment was affirmed by the Supreme Court of the United States. Same case, 228 U. S. 433, 57 L. ed.

As another assignment in its motion in arrest why the judgment should be arrested, the defendant says that some of the counts of the declaration are defective in not alleging lack of knowledge by the intestate of the various grounds of negligence and items of carelessness on the part of the defendant, alleged as constituting the cause of action, the verdict of the jury being general. Assuming some of the counts to be thus defective, it is not a ground for arresting the judgment. The statute expressly provides that if a declaration contains defective counts and also good counts for the same cause of action, the verdict shall be deemed the finding of the jury on the good counts, unless it otherwise appears; and judgment shall be given according to the right of the cause and the matters in law, without regard to the imperfections or defects in other counts. P. S. 1505; Vernum v. Highgate, 65 Vt. 416, 26 Atl. 628.

This in effect disposes of all questions within the exceptions and stated as points to be discussed in defendant's brief.
644 Judgment affirmed.

This is to certify that the above decision was rendered by the Supreme Court of Vermont at the January Term, 1914.
Febrary 25, 1914.

JOHN H. WATSON,
Associate Justice Supreme Court of Vermont.

645 STATE OF VERMONT,
Franklin County, ss:

I, Geo. C. Stevens, Clerk of said County of Franklin and Clerk of the Supreme Court of the State of Vermont for said County, the same being a Court of Record and having a Seal hereto attached, do hereby certify that the Hon. John H. Watson, whose name is subscribed to the foregoing Opinion, certified by him, and written thereon was at the time of rendering said opinion and signing the certification thereof and still is an Associate Justice of the Supreme Court of the State of Vermont, elected, commissioned, sworn and

duly qualified to certify the same. And further that I am well acquainted with the handwriting of said Associate Justice, and verily believe that the signature thereon written is genuine.

In Testimony whereof I have hereunto subscribed my name and affixed the Seal of Said Supreme Court at the City of St. Albans in said County this 28th day of February, A. D. 1914.

[Seal Supreme Court State of Vermont.]

GEO. C. STEVENS, *Clerk.*

646 UNITED STATES OF AMERICA, *ss:*

Supreme Court of United States, October Term, 1913.

CENTRAL VERMONT RAILWAY CO., Plaintiff in Error,
vs.
MARY THERESA WHITE, Adm'r'x Estate of Enoch L. White, Defendant in Error.

Error to Supreme Court of Vermont.

In the above entitled cause, it is hereby stipulated that the following may be omitted from the printed record in addition to what was left out by præcipe on file:

The testimony of Gardner Rice and Herbert Rice and pages 143 to 160 of record now on file with the clerk of the United States Supreme Court.

Dated at St. Albans, Vt., May 12, 1914.

CENTRAL VERMONT RAILWAY CO.,
Plaintiff in Error,
By HENRY B. AMEY, *Attorney.*
MARY THERESA WHITE,
Defendant in Error,
By WARREN R. AUSTIN, *Attorney.*

647 [Endorsed:] File No. 24,112. Supreme Court U. S. October Term, 1913. Term No. 961. Central Vermont Railway Company, Pl'ff in Error, vs. Mary Theresa White, Administratrix etc. Stipulation to omit parts of record in printing. Filed May 20, 1914.

Endorsed on cover: File No. 24,112. Vermont Supreme Court. Term No. 407. Central Vermont Railway Company, plaintiff in error, vs. Mary Theresa White, administratrix of the estate of Enoch L. White. Filed March 16th, 1914. File No. 24,112.

Office Supreme Court, U. S.
FILED
JAN 16 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 407.

CENTRAL VERMONT RAILWAY CO.,

PLAINTIFF IN ERROR,

—VS.—

MARY THERESA WHITE, ADMRX. OF THE ESTATE OF ENOCH L. WHITE,

DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM AND MOTION FOR DAMAGES.

WARREN R. AUSTIN,

Attorney for Defendant in Error.

Charles W. Buckley, Printer, St. Albans, Vt.

BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 407.

CENTRAL VERMONT RY. CO.,
PLAINTIFF IN ERROR,

vs.

MARY THERESA WHITE, ADMRX.,
OF THE ESTATE OF ENOCH L.
WHITE, DEFENDANT IN ERROR

MOTION TO DISMISS WRIT OF ERROR.

This is an action under the Federal Employers' Libility Acts to recover for death of plaintiff's intestate, for the benefit of the widow and three minor children.

The error assigned below and assigned here, were founded upon the lack of an allegation in the declaration that the plaintiff's intestate was engaged in Interstate Commerce at the time of his death. Demurrer on this ground was waived, and a plea in bar was filed alleging this omitted fact, and it was expressly iterated by a replication, whereupon trial by jury was had and a verdict in one

sum was rendered for the defendant in error.

Upon exception to the Supreme Court of Vermont, it was held that these objections were waived and cured by the conduct of plaintiff in error under the rules of pleading and practice in Vermont.

Certain assignments of error are made here, founded upon the fact that the verdict was in soldo, and that the the jury did not apportion and return the amount of damages due to each beneficiary, but this question was not raised below.

No Federal right, title, privilege or immunity which was specially set up or claimed below, and was denied to the plaintiff in error, is asserted by any of the assignments of error.

This Court has no jurisdiction of this case, because the final judgment of the highest court of Vermont, in this case, did not involve a decision of any of the jurisdictional facts contained in Chapter 237 of the Judicial Code of the United States.

This writ of error will delay the proceedings on the judgment of the court below, and was sued out merely for such delay.

WHEREFORE defendant in error moves this Honorable Court:

1. To dismiss this writ of error.

2. To award damages to the defendant in error in adition to interest.

Dated at the City of St. Albans, Vermont, this 30th day of April, 1914.

MARY THERESA WHITE, Adminstratrix,
Defendant in Error,

By her Attorney, WARREN R. AUSTIN.

MOTION TO AFFIRM.

The same ground as that first stated in the foregoing motion.

These assigned errors are so frivolous as not to need further argument, because this Honorable Court has repeatedly held that a defective declaration of a good cause of action is cured by a plea which supplies the allegations omitted, by waiving demurrer, pleading over and going to trial on the merits, and by a verdict which necessarily found the facts so omitted.

All the Federal questions properly presented by this writ of error are devoid of merit, and unsubstantial, and the writ has been prosecuted for delay.

WHEREFORE the defendant in error moves this Honorable Court:

1. To affirm the judgment below.
2. To award damages in addition to interest.

Same date and signature as above.

SUGGESTION.

If the foregoing motions are denied it is suggested that the cause be transferred for hearing to a summary docket, as provided in Sec. 6, Rule 6, because delay in this case operates substantially as

a denial of justice in view of the poverty of the defendant in error and her three minor children.

The record of this case has not yet been printed by the plaintiff in error, but sufficient extracts therefrom are here printed in the appendix to enable the Court to decide these motions.

I.

No Federal question is presented by the following assignments relating to the pleadings, practice, motion for verdict and motion in arrest of judgment, to wit:

Pleadings. 1. Redered a judgment under Federal Employers' Liability Law upon a declaration at common law.

Appendix p. 1.

" 2. Interpreted a common law declaration as a declaration under said Federal Statutes.

Appendix p. 1.

" 4. Held that a plea in bar thereto alleging the facts omitted from the declaration, replied to precludi non, iterating said facts, cured the defect.

Appendix p. 2.

" 6. Holding the declaration as cured to be under Federal Statutes, and not under Vermont Statutes.

Appendix p. 2.

Practice. 10 and 24. Holding that the trial court did not err in admitting (any) evidence (at all) after issue had been joined on the pleadings, plaintiff having waived demurrer and proceeded to trial on merits.

Appendix pp. 3, 11.

Practice. 11. Holding that by pleading over, and going to trial on the merits, the defendant (plaintiff in error) waived its demurrer.

Appendix p. 3.

Motion in Arrest. 14 (2) (3) (5), 19 and 21. Holding that after judgment on demurrer there can be no motion in arrest of judment for any exception that might have been saved on demurrer.

Appendix pp. 5, 6, 7, 8, 10.

" 22. Holding that verdict in favor of party who made a departure in pleading cured the fault, where the matter replied would have been a sufficient

answer in substance to defendant's plea, had it been pleaded in the first instance.

Appendix p. 10.
Decision Appendix p. 58.

Motion for Verdict. 28. Holding that motions 2 and 9 for directed verdict were properly overruled because the pleadings and practice had cured the omissions in the declarations on which they were based.

Appendix p. 13.
Decision Appendix pp. 69, 70.

" 30. Holding that motion 10 for directed verdict was properly denied because the facts upon which it was based were outside the range of evidence, being judicially admitted by both parties.

Appendix p. 15.
Decision Appendix p. 70, [22].

The right set up and claimed was to have a declaration which alleged that the plaintiff's intestate and the train he was working on were engaged in Interstate Commerce.

The decision was not against but expressly in favor of such right: "Without which character of his employment there could be no right of action

under the Federal Employers' Liability Act."

Decision Appendix p. 56.

The decision is of a question of pleading and practice under the laws of Vermont.

Decision Appendix p. 57. [1].

A decision not that the claims have no merit, but that they have been waived or cured, does not involve a Federal question.

Brown vs. Massachusetts, 144 U. S. 573. 12 Sup. Ct. Rep. 757; 36 L. ed. 546.

A decision that defects of declaration are cured by allegations of plea supplying omissions, involves nothing more than a question of pleading and practice in the State courts.

Texas & N. O. R. Co. vs. Miller et als, 221 U. S., 406, 417, 55 L. ed. 789, 796.

Errors assigned upon the record relating to matters of pleading and practice under the laws of a State, involve no Federal question.

Buena Vista County vs. Iowa Falls S. C. R. Co.
112 U. S. 165, 5 Sup. Ct. Rep. 84, 28 L. ed. 680.
Chicago, R. I. & P. R. Co. vs. Schwyhart et als, 227 U, S. 183, 57 L. ed. 473.

Moreover, these assignments are concluded and unsubstantial, this court having repeatedly held that a defective declaration of a good cause of action is cured by a plea which supplies the allegations omitted, by waiving demurrer, pleading over and going to trial on the merits, and by a verdict which necessarily found the facts so omitted.

United States vs. Morris, 22 U. S. 245, 6 L. ed. 314, 10 Wheat. 246.
Cited in Vickery vs. New London N. R. Co. and this plaintiff in error, 89 Atl. 277.
Baker vs. Warner, 231 U. S., 588; 58 L. ed., 384.
Missouri P. R. Co. vs. Castle, 224 U. S. 541; 56 L. ed. 875.

It was not necessary to refer expressly to the Federal Act.

2d Employers' Liability Cases, Mondou vs. N. Y., N. H., & H. R. Co. 223 U. S. 1, 56 L. ed. 327, 347; 38 L. R. A. (N. S.) 44; 32 Supt. Ct. Rep. 169.

Mention of a State Statute would not invalidate declaration.

Missouri K. & T. R. Co. vs. Wulf, 226 U. S. 570, 57 L. ed. 355, 363.

II.

Assignments relating to refusal to grant requests to charge:

13. Refusing to instruct jury that defendant was operating under standard rules, and that plaintiff's intestate was violating those rules. This was original request No. 10.

Appendix p. 4.

15. Refusing to grant additional request 6 which read as follows: "Even though the defendant was negligent, if Enoch L. White assumed the risk of his fatal injuries, plaintiff cannot recover."

Appendix p. 7.

34. Refusing to grant original requests numbers 1 to 12 inclusive, and additional requests numbers 1, 5, 6, and 7.

Appendix pp. 17, 18.

These three assignments point to the refusal of the Court to consider a group of seventeen requests to charge, because the exception taken thereto was not specific and was too general.

Decision Appendix p. 73.

This was a decision of practice under Vermont law.

Louisville & Nashville R. R. Co. vs. Woodford, et als., 234 U. S., 46, 58 L. ed. 1202.

Moreover these assignments are frivolous:

A request in such general terms on the subject of assumption of risk as not to give the jury a correct understanding of the law, properly refused.

Norfolk & W. R. Co. vs. Earnest, 229 U. S. 113; 57 L. ed. 1096.

Bishop vs. Readsboro Chair Mfg. Co., 85 Vt. 141.

French vs. Ware, 65 Vt. 338; Vaughn vs. Porter, 16 Vt. 266.

Westmore vs. Sheffield, 56 Vt. 239.

A case of eighteen special requests and one exception to their refusal.

Chateaugay Ore & Iron Co. vs. Blake, 144 U. S. 476; 12 Sup. Ct. Rep. 731, 36 L. ed. 510.

An exception taken as an entirety to rulings upon several requested instructions, unavailing.

McKabe & So. Const. Co. vs. Wilson, 209 U. S. 275, 52 L. ed. 788.

III.

Assignment 14 (1) (4) relating to Motion in Arrest of Judgment.

Appendix pp. 4, 6.

The decision was based upon the Statute of Vermont prohibiting the arrest of judgment where a declaration contains good counts as well as defective counts, for the same cause of action.

Decision Appendix p. 80, [34].

Moreover the rule is the same in this court.

Bond vs. Dustin, 112 U. S. 604; 28 L. ed. 835.
Wabash Railroad Co. vs. Hayes, 234 U. S., 86, 58 L. ed., 1226.

IV.

Assignment 20 Ignoring Defendant's Motion to Dismiss Plaintiff's Replication.

Appendix p. 9.

This motion was a mere excrescence upon the record, being identically the same as defendant's demurrer to the replication which was waived.

Decision Appendix p. 57 [1].

V.

Assignments relating to Questions of Evidence, the effect of which is not sought for purposes over which this Court has jurisdiction:

25. Holding admissible testimony of a conductor that he received a certain order and clearance card containing an omission of a material statement.

Assignment Appendix p. 11.
Exceptions Appendix p. 46, (14).
Decision Appendix p. 61 [10]–65 [11].

26. Excluding answer to a question held to be not cross-examination.

Assignment Appendix p. 12.
Exceptions Appendix p. 47 (18).
Decision Appendix p. 65 [11].

27. Excluding an offer in the whole because a part of it was not admissible.

Assignment Appendix p. 12.
Exceptions Appendix p. 50 (41).
Decision Appendix p. 69 [20].

Such questions of evidece are not reviewable on writ of error to a State Court.

Central P. R. Co. vs. California, 162 U. S. 91, 16 Supt. Ct. Rep. 766; 40 L. ed. 903.

Martin vs. Marks, 97 U. S. 345; 24 L. ed. 940.

Williams vs. Norris, 12 Wheat. 117; 6 L. ed. 571.

Makey vs. Dillon, 4 How. 421; 11 L. ed. 1038.

Dowes vs. Richards, 151 U. S. 657; 14 Sup. Ct. Rep. 452, 38 L. ed. 309.

VI.

Assignments relating to Motion for Directed Verdict.

9, 31, (1) (3) 32. Refusing to direct a verdict for the defendant (1) because the plaintiff is not in law entitled to recover, (2) because the defendant was free from fault.

Appendix pp. 3, 16.

33. Because there was no evidence that plaintiff's intestate did not know the danger.

Appendix p. 17.

These assignments are frivolous:
Plaintiff may go to the jury where there is any

evidence that fairly and reasonably tends to establish liability.

Fadden vs. McKinney, et als, 87 Vt. 316, 89 Atl. 351.
Gilla Valley G. and N. R. Co. vs. Hall, 232 U. S. 94, 58 L. ed., 521.
North Carolina R. Co. vs. Zachary, 232 U. S., 248, 58 L. ed. 597.
Traxell vs Delaware L. & W. R. Co. 227 U. S. 433; 57 L. ed. 586.

There was such evidence.

Exceptions Appendix pp. 33-39.
Decision Appendix p. 70 [23-25].

Engine 708 leaked steam before the accident and was booked for repairs in this respect.

Evidence Appendix pp. 81-83.

On the night in question it leaked badly so could not see the switches before starting out.

Evidence Appendix pp. 83, 84.

After starting out it leaked so all the way to the accident that engineer or fireman could not see forward past the engine.

Evidence Appendix pp. 84, 85.

Because of such escaping steam, when the train

left Randolph, and up to the time of the collision, they could not see the tail lights on train 401.

Though the evidence tended to show they were all lighted.

Evidence Appendix p. 85.

And that the track was straight, the last half of a mile or more.

Owing to the size of the wheels engine 708 was faster than engine 401.

And so steadily and rapidly gained upon her the night in question that with delays of the latter, when train 708 stopped at Bethel, train 401 had not reached Randolph, 7.1 miles away.

Defendant's train despatcher, through reports by telegraph, was informed of the positions of these two trains as they proceeded north from White River Junction to the place of the accident.

At Bethel clearance card Form A was delivered with a train order to train 708, and it contained no mention of train 401 ahead.

Evidence Appendix pp. 86-89.

No notice was given to either train at Bethel or Randolph of the position of the other.

Intestate had no notice or warning of any kind whatever that 708 was following.

Train 401 was running at the time of the collision about twelve miles an hour, and the speed of 708 was then from twenty-two to twenty-four miles an hour, while the average rate of speed for extra

freight trains was from ten to fifteen miles an hour.

Evidence Appendix pp. 90, 91.

29. Motions 4, 5, 6 and for a directed verdict based on claim that contributory negligence defeated the action.

Assignment Appendix pp. 14, 15.

These assignments are frivolous.

Decision Appendix p. 70 [21].
Act Apr. 22, 1908, c. 159; 35 Stat. 65; U. S. Comp. Stat. Sup. 1911 p. 1322.
Norfolk & W. R. Co., vs. Earnest, 229 U. S. 114; 33 Sup. Ct. Rep. 654; 57 L. ed. 1096.

The above stated negligence of the defendant was the proximate cause of the injury.

35. (4) (6) (7). For refusal to direct a verdict on motions which were not brought to the attention of the court below, and were omitted from the praecipe in this court.

Assignment Appendix pp. 23, 24.

VII.

Assignments relating to refusal to

grant requests to charge.

34. (2) (3) (4). No exception was taken below.

Assignment Appendix pp. 22, 23
Exceptions Appendix p. 51.

(Note that these are the second series of (2), (3), (4), under assignment 34).

36. (1) Holding that a relevant circumstance should not be eliminated from a case solely because it was not the proximate cause of injury.

(2) Holding that a charge more favorable than the defendant was entitled to is not ground for exception.

(3) Holding that a charge which is the legal consequence of the preceding part of the charge, made in accordance with defendant's request and not excepted to is not error.

(4) Holding that error in the use of "and" instead of "or" is cured by a supplemental charge on the same subject to which no exception was saved.

(5) Holding that one portion of the charge should be construed in connection with another portion of the charge, and when done that the charge was not subject to the criticism that

the eliment of proximate cause was omitted from the statement of liability.

(6) Holding that the language used on the subject of damages was sufficiently explicit.

Assignment Appendix pp. 25-32.
Decision Appendix pp. 73(1)-79.

These are not decisions of Federal questions but of general law, and they are obviously correct.

The King Case, 222 U. S. 222; 56 L. ed. 173, 32 Supt. Ct. Rep. 79.
Southern Railway Co. vs. Gadd, 233 U. S. 572, 58 L. ed. 1099.

(7) To the charge that the burden of proof of contributory negligence is on the defendant is concluded by previous authority.

Decision Appendix p. 79 [32, 33] (7).
Assignment Appendix p. 32.
Norfolk & Western Ry. vs. Earnest, 229 U. S. 113, 57 L. ed. 1096, 1100.
Seaboard Air Line Railway vs. Moore, 228 U. S. 431, 59 L. ed. 907.

VIII.

Assignments 3 and 5 relating to the

doctrine of Assumption of Risk.

Assignment Appendix p. 2.

The only right touching this subject claimed by defendant below was additional request to charge No. 6, one of the series of seventeen requests to which a single exception was saved, and therefore held to be too general for consideration, and which request is not set forth in the assignment of errors. (See said request printed Supra II, assignment 15.) These claims were not set up below.

Exceptions Appendix p. 51.

They were not decided.

Decision Appendix p. 73.

Under practice in Vermont there must be a specific objection and exception.

Luce vs. Hassan, 76 Vt. 450,
Doyle vs. Melendy, 83 Vt. 339,
Usher vs. Severance, 86 Vt. 523.
Bishop vs. Readsboro Chair Mfg. Co. 85 Vt. 141;

The objection and exception must be set up in the bill of exceptions in the Supreme Court of Vermont.

Higgins vs Howard, 5 Vt. 73.
Small vs. Haskins, 30 Vt. 172.
Fadden vs. Mckinney, 87 Vt. 316; 89 Atl. 351.

The exception must be briefed or it is treated as waived.

Barney's Admrx. vs. Quaker Oats Co., 85 Vt. 372, 407; 82 Atl. 113.

These questions cannot be raised for the first time in the assignment of errors in the Federal Court.

Mallers vs. Commercial Loan & Trust Co., 216 U. S. 614; 54 L. ed. 638
Southern Railway Co. vs. Gadd Supra.
Norfolk & Western Railway Co. vs. Earnest, 229 U. S. 113; 57 L. ed. 1096.

IX.

Assignment 7. Claiming that court below held testimony of experts to be of no value.

Assignment Appendix p. 2.

No such question was set up or decided below.

Exceptions Appendix pp. 44-53.
Decision Appendix pp. 54-80.

X.

Assignments 8, 16, 17, 18 and 23.

Claiming judgment void because verdict was for a gross sum and not apportioned by the jury.

Assignment Appendix pp. 2, 7, 8, 11.

These alleged errors were not set up or claimed or decided below.

Exceptions Appendix pp. 51, 52.
Decision Appendix pp. 78 [31] (6).

An objection to the charge of the trial court upon the subject of damages comes too late when raised in the Federal Supreme Court for the first time.

Phoenix Railway Co. vs. Landis, 231 U. S. 578, 58 L. ed. 377.

This case differs from Gulf, Col. & S. F. R. Co., vs. McGinnis, 228 U. S. 171, 57 L. ed. 785, in this that all of the beneficiaries were dependent solely on the plaintiff's intestate.

Exceptions Appendix p. 34,
Decision Appendix p. 56.

It is a moot question because the action is for the benefit of the same persons, whether under the Vermont Statute or under the Federal Statute.

Kimball vs. Kimball, 174 U. S. 158, 161, 43 L. ed. 932.

Defendant (plaintiff in error) requested the court to charge directly to the contrary, to wit, "(1) The amount of recovery in this case is not to be determined by the number of children of the deceased intestate for whose fatal injuries this suit is brought."

Assignment Appendix p. 22 (1).

Every reference to the subject of damages below was inconsistent with this claim.

Assignment Appendix pp. 13, 14, 20, 22, 23.

XI.

Assignments 11 and 12. Asserting a right under the 14th Amendment to the Federal Constitution.

Assignment Appendix p. 3.

No constitutional question was raised or decided below.

Assignment Appendix p. 13, "2".
Exceptions Appendix pp. 44-54.
Decision Appendix pp. 69, 70.

Assignment 12 points to request to charge No. 8, which was one of a series of seventeen requests, which the court refused to consider be-

cause only a general exception was taken to them all.

Assignment Appendix p. 3, 20 (8), 17 (34).

Assignment 11 has been considered under Supra I of this brief.

XII.

The prayer for damages on affirmance or dismissal should be granted, because the Federal questions are devoid of merit and unsubstantial, and the writ has been prosecuted for delay.

Deming vs. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140.

Southern Railway Co. vs. Gadd, Supra.

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In the Supreme Court of Vermont.

MARY THERESA WHITE, ADMRX. OF THE ESTATE OF ENOCH L. WHITE, Plaintiff,
vs.
THE CENTRAL VERMONT RAILWAY COMPANY, A CORPORATION, Defendant.
No. 78

ASSIGNMENT OF ERRORS.

Now comes the above defendant, files herein its petition for a Writ of Error and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment.

1. The Supreme Court of Vermont erred in deciding, affirming and rendering a judgment for the plaintiff on a common law declaration upon the hypothesis that it was a declaration under the Federal Employer's Liability Law enacted by the Congress of the United States.

2. The Supreme Court of Vermont erred in holding and deciding that a verdict for the plaintiff under a common law declaration interpreted by the trial court to be a declaration under the Federal Employer's Liability Law, was not in violation of the 14th amendment to the Constitution of the United States.

3. The Supreme Court of Vermont erred in holding and deciding that the doctrine of *assumption of risk* is eliminated by the Federal Employer's Liability Law enacted by the Congress of the United States.

4. The Supreme Court of Vermont erred in holding and deciding that a plea in bar of the Federal Statute of the Congress of the United States could be construed into an admission of fact to establish interstate commerce so as to make a common law declaration into a declaration under the Federal Employer's Liability Act of the Congress of the United States.

5. The Supreme Court of Vermont erred in holding and deciding that under the Federal Employer's Liability Law of the Congress of the United States under all the evidence introduced, the plaintiff did not assume the risk.

6. The Supreme Court of Vermont erred in holding and deciding that an action under the Federal Employer's Liability Act of Congress governing as to liability joined with the Statute law of the State of Vermont relating to the distribution of damages under the same declaration, does not violate the 14th amendment to the Constitution of the United States.

7. The Supreme Court of Vermont erred in holding and deciding that under the Federal Employer's Liability Act of the Congress of the United States the testimony of experts in railroad operation and as to the safest method of running trains on the road is of no force and value and ought to be disregarded and is not conclusive where there is no contrary evidence.

8. The Supreme Court of Vermont erred in holding and deciding that a verdict of $7,168, in one

single undivided sum is a valid verdict under the Federal Employer's Liability Law in favor of Mary Theresa White, Elsiet White, Enoch L. White and Mary A. White, without stating specifically the amount to be received by each.

9. The Supreme Court of Vermont erred in refusing to render judgment for the defendant on all the evidence submitted.

10. The Supreme Court of Vermont erred in holding and deciding that under the Federal Employer's Liability Act of Congress, objections to the introduction of any and all evidence could not be sustained where the suit is brought under the Federal Employer's Liability Act of Congress and the declaration is at common law, claiming a recovery for fatal injuries while the plaintiff's intestate and the defendant were both engaged in intra-state commerce.

11. The Supreme Court of Vermont erred in holding and deciding that the defendant could be deprived of its fundamental rights under the 14th amendment to the Federal Constitution by going to trial on the merits after demurrer on the ground of departure for the reason that the declaration of the plaintiff was at common law and the replication was a confession that the case was brought under the Federal Employer's Liability Law had been overruled.

12. The Supreme Court of Vermont erred in holding and deciding that the refusal to instruct the Jury as follows: "This case is under the Federal Employer's Liability Law, but the declaration does not so state and the replication purporting to be an amendment to the declaration does not bring the matter within the purview within the Federal Law, hence, to

render a verdict for the plaintiff under the pleadings as they now stand, would be in violation of the 14th amendment to the Federal Constitution, which forbids the taking of property without due process of law and guarantees to every one equal protection of the laws" was not error.

13. The Supreme Court of Vermont erred in holding and deciding that it was not error for the trial Court to *refuse to instruct the Jury* as follows:

"It has been conclusively shown that the defendant Company at the time the plaintiff's intestate received his fatal injuries was operating under the *standard rules;* that they are in universal use throughout the Country; that they have been adopted after careful investigation by the best railroad experts. The evidence shows also without dispute that these rules were not observed by the plaintiff's intestate at the time he received his fatal injury."

14. The Supreme Court of Vermont erred in holding and deciding that the *motions in arrest of judgment* made by the defendant should not be sustained. They are as follows:

(1.) "A motion in arrest of judgment, because in the first count of the plaintiff's declaration, the plaintiff alleges that the defendant operated, managed and controlled said railroad, its engines and cars, and managed and controlled its employees in an unsafe, insecure, careless and dangerous manner, and that said defendant, then and there ran its cars and engines in a careless and imprudent manner, and the said defendant then and there employed and suffered to remain in its employ careless, incompetent and negligent men as conductors, engineers, station agents, train dispatchers and telegraph operators, and the said defendant did not then and there require said conductors, engineers, station agents, train dispatchers

and telegraph operators to observe said rules and regulations that were then and there necessary for the safety and security of passengers, employees and freight, and the plaintiff's intestate upon said defendant's road, all of which was well known to the officers of the defendant, dangerous to the lives of the passengers, employees and freight and the plaintiff's intestate on passing over said railroad, all of which was not known to the plaintiff's intestate, but known to the defendant.

"In the second count of said declaration, substantially the same allegations are made, except that, there, knowledge on the part of the defendant of the various items of negligence hereinbefore set forth, and in said second count there is no lack of knowledge on the part of the plaintiff's intestate of the various grounds of negligence and items of carelessness set up in said second count.

"In the third count of said declaration there is no lack of knowledge alleged on the part of the plaintiff's intestate of the various grounds of negligence and items of carelessness on the part of the defendant making up said cause of action.

"In the fourth count of said declaration there is no lack of knowledge of the various grounds of negligence and items of carelessness on the part of the plaintiff's intestate alleged."

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(2.) "A motion in arrest of judgment, because the rule of damages in the declaration purports to be governed by the laws of the State of Vermont and the substance of the Vermont Statute Law now existing upon the subject of the recovery of damages. The declaration purports to be under the Federal Employer's Liability Law. One law for substantive recovery and

another law for the distribution of damages cannot stand together in the same declaration.

"By the Federal Law the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the law of Vermont, the grand children would take it all to the exclusion of parents. By the Federal Law in case there is no widow, husband, children or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont Law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased."

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(3.) Motion in arrest of judgment, because the plaintiff's declaration is not under the Federal Employer's Liability Law. The defendant plead the Federal Statute in bar, and the plaintiff filed a replication setting up the Federal Employer's Liability Law. This was a complete departure from the original declaration.

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(4.) Motion in arrest of judgment, because the verdict of the jury in this case was a general verdict, and the second, third and fourth counts of the declaration are bad because they do not allege lack of knowledge on the part of the plaintiff's intestate of the dangerous elements of the negligence on the part of the defendant which caused his fatal injuries.

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

(5.) Motion in arrest of judgment, because this declaration purports to be under the Federal Employer's Liability Law, and contains no allegation that the defendant was engaged in interstate commerce at the time of the fatal injuries to the plaintiff's intestate, and does not allege that the plaintiff's intestate was then and there engaged in a promotion of that commerce.

The Supreme Court of Vermont erred in holding and deciding that the following motion should not be sustained.

15. The Supreme Court of Vermont erred because it in legal effect denied the defence of assumed risk to the defendant because said Court overruled a motion to instruct a verdict for the defendant on that ground for the trial court, nowhere instructed the jury on the proposition of *assumed risk*, although requested so to do and the Supreme Court sustained this action of the trial court.

16. The Supreme Court of Vermont erred in holding and deciding that giving *a verdict* of the jury under the State Statute in a *total* sum *without division* was a lawful verdict when the case was tried under the Federal Employer's Liability Act of Congress and there were four beneficiaries set up in the declaration; the widow and four children; and under the Federal Employer's Liability Law the verdict would have to be apportioned by the jury among them.

17. The Supreme Court of Vermont erred in holding and deciding that recovery could be had under a declaration that did not set forth any dependency on the part of the beneficiaries mentioned, and in holding that a refusal by the trial court to instruct the jury that a *recovery* in *one single gross sum* could not be had, was not contrary to the meaning and terms of the

Employer's Liability Act of the Congress of the United States.

18. The Supreme Court of Vermont erred in holding and deciding that on motion by defendant in arrest of judgment after *verdict* of the jury of a sum of money for the plaintiff *in solido*, that judgment should not be arrested because the verdict was rendered under the State Statutes of Vermont and the law governing the case was the Federal Employer's Liability Law of the United States, which requires a division of damages to each dependent relative according to the degree of dependency.

19. The Supreme Court of Vermont held and decided with reference to the plaintiff's declaration as follows: "None of the counts contain averments showing that the train on which the intestate was engaged at the time of his injury was being operated in interstate or foreign commerce nor that he was then employed by the defendant in such commerce, without which character there could be no right of action under the Federal Employer's Liability Act." The defendant pleaded in bar to this declaration, setting up the Federal Employer's Liability Law, and that at the time intestate received his injuries, he was employed by the defendant in interstate commerce.

The plaintiff replied to this plea confessing that both the plaintiff and the defendant were engaged in interstate commerce at the time of the plaintiff's fatality and setting forth that by the laws and statutes of the United States and of the State of Vermont that the Court had jurisdiction to determine the matter. The Court therefore erred in holding and deciding that after demurrer to replication on the ground" that the decla-

ration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the actions should be under the Federal Employer's Liability Law had been overruled, that the motion in arrest of judgment could not be available to the defendant for the reason that there was no way in which to distribute the damages.

20. The Supreme Court of Vermont erred in failing to pass in any manner whatever on the defendant's motions to dismiss the plaintiff's replication made for the following reasons:

(1.) The replication is no answer to the defendant's plea.

(2.) Said replication is a complete departure from the plaintiff's writ.

(3.) Said replication introduces a new cause of action not contemplated in the plaintiff's declaration.

(4.) Said replication does not support or fortify said plaintiff's declaration.

(5.) Said replication does not present matter of estoppel to the defendant's plea.

(6.) Said replication does not traverse such plea.

(7.) Said replication does not confess and avoid said plea.

(8.) The declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the Federal Employer's Liability Law.

(9.) The action in said declaration of the plaintiff is at common law, while the replication of the said plaintiff denominates the action as under the Employ-

er's Liability Law.

21. The Supreme Court of Vermont erred in holding and deciding as follows: "After verdict the defendant undertook by motion in arrest of judgment to raise the same legal questions respecting the declaration with reference to the Federal Employer's Liability Law as were presented on the demurrer though some of the assignments were somewhat different in form, one being that the declaration purports to be under the said Federal Statute but contains no allegations that the defendant was engaged in interstate commerce at the time of the injury to the intestate nor that the intestate was then and there engaged in the promotion of such commerce ********** The rule is, however, that after judgment on demurrer by solemn determination there can be no motion in arrest of judgment for any exception that might have been taken on arguing the demurrer.

22. The Supreme Court of Vermont erred in holding and deciding as follows: "Moreover that though the declaration lacks averments showing that the intestate at the time of his injury was employed by the defendant in interstate or foreign commerce, yet not only was the declaration aided in this respect by the defendants expressly averring in defendant's plea in bar the facts omitted from the declaration and essential in order to set forth a good cause of action under the Federal Law ****** But the matter replied by way of departure, if it was a departure a question which we do not decide, would have been a sufficient answer in substance to the defendant's plea had the plaintiff pleaded in it in the first instance, and the verdict in favor of the party who made the departure cured the fault.

23. The Supreme Court of Vermont erred in holding and deciding as follows: "The only mode of taking advantage of the departure is by a demurrer and since the defendant instead of standing upon its demurrer took issue upon the replication containing the departure which being found against the defendant, the Court will not arrest the judgment for after such finding it necessarily appears on the whole record that the plaintiff is in law entitled to judgment".

This was error because the *judgment being one in solido* is void under the Federal Employer's Liability Law for the reason that damages must be apportioned by the Jury in accordance with the dependency of the relatives entitled to recover for his death.

24. The Supreme Court of Vermont erred in holding and deciding; "It follows that since by its plea in bar the defendant expressly supplied the omissions in the declaration essential to a good cause of action under the Federal Law and since issue was joined and the replication departing (defendant asserts) from the declaration accordingly, the defendant's objection to the introduction of any evidence because the declaration does not state facts sufficient to constitute a cause of action under that Law, was properly overruled".

25. The Supreme Court of Vermont erred in holding and deciding that the conductor of 708 the pursuing train on the night of the collision, should be allowed to testify "that he received a 19 order at Bethel and that he delivered the order to the engineer of the train and after making the order complete the train proceeded; that with this order he received a *clearance* card and a copy of the same was then given to the engineer, but it did not contain a record of any

train ahead.

26. The Supreme Court of Vermont erred in holding and deciding as follows: "The Witness Wright conductor of 708 on the night in question, called as a witness by the plaintiff having testified in examination in chief that he received an order and clearance card at Bethel, that there was no stop after leaving Bethel and he had no notice whatever that train 401 was ahead of him, that he did not believe that he was going to meet a freight train between Randolph and Braintree, that he was running between 20 and 23 miles an hour, that he saw no tail lights on 401 at any time before hitting the train, that he had no warning or notice of any kind that 401 was ahead of him, that there was a straight track above Randolph back from the scene of the accident for about ½ mile". Was asked in cross examination," and supposing you were delayed on sidings and if you got back on the main line a lot of time is lost, how *did* you protect your rear end", that it was not error to exclude the question as in cross examination.

(Should be—"how *do* you protect etc.," Exceptions appendix pp. 47, 48.)

27. The Supreme Court of Vermont erred in holding and deciding as follows: The defendant offered to show by its witness one Fitzsimons an expert on engines and a master mechanic as follows: "We would like to show that under the Federal Law those engines all are frequently inspected and that this (No. 708) among others was inspected prior to the time when it was used on this occasion and was found all right. This offer includes not only 708, but engines in no wise connected with this case. As to the latter

the evidence was not admissable, consequently the whole was properly excluded".

28. The Supreme Court of Vermont erred in holding and deciding that motions 2 and 9 for a verdict at the close of all the evidence should be overruled, the Court deciding as follows: "No. 2 and No. 9 are based upon the claimed omission of necessary averments in the declaration to entitle the plaintiff to recover under the Federal Employer's Liability Statute. In legal effect these are disposed of by our holdings on the demurrer and on the grounds considered in the motion in arrest of judgment and need not be further noticed".

Nos. 2 and 9 are as follows:

"2. Another motion for a directed verdict. Because the action purports to be brought under the Federal Employers' Liability Law, but the declaration does not so state, and the replication purporting to be an amendment to the declaration, does not bring the matter within the purview of this Federal Law. Hence, to render a verdict for the plaintiff under the pleadings as they now stand would be in violation of the Fourteenth Amendment to the Federal Constitution, which forbids the taking of property without process of law and guarantees to everyone equal protection of the law".

"9. Now, another motion for a directed verdict, because the declaration purports to be under the Federal Employer's Liability Law, while the part which relates to the damages is absolutely under the statute law of the state of Vermont, I think it is Section 2840, for the amendment to the Federal Law of April 5, 1910, shall be construed as dedicating the fund re-

covered to the widow and children, as specified in Section 9: Then there is discord between the provision of the Federal Law and the law of Vermont. By the Federal Law the grand children of the deceased would receive nothing if the deceased's parents were living; by the law of Vermont, the grand children will take it all to the exclusion of the parents. By the Federal Law, in case there were no widow, or husband, or children, or parents, the distribution would be to such of the next of kin as were dependent; by the Vermont law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased. So that a general recovery under this declaration would produce a fund which the Court wouldn't know how to distribute".

29. The Supreme Court of Vermont erred in overruling *motion for a verdict,* Nos. 4, 5 and 6 made by the defendant. The decision of the Court upon these points is as follows: "The grounds of Nos. 4, 5 and 6 are that a contributory negligence by the intestate under the Federal Statute, contributory negligence by the servants, does not defeat the action. It affects the question of damages only. By Section 3 the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the Jury in proportion to the amount of negligence attributable to such employee as compared with the combined negligence of himself and the employee". Motions 4, 5 and 6 above referred to by the Court are as follows:

"4. Another motion for a directed verdict. Because on all the evidence it appears without contradic-

tion that the proximate cause of the injury to the plaintiff's intestate was due to his failure to observe a rule of the company which was binding and which left no discretion in him under the circumstances as they existed".

"5. Another motion for a directed verdict. Because the evidence without contradiction shows that the proximate cause of the injury was the failure of the deceased brakeman, the plaintiff's intestate, to put down his torpedoes and fusees at Randolph as the rule required".

"6. Another motion for a directed verdict. Because the evidence shows that he was instructed and directed to protect the rear of his train by the conductor and that he failed to do this".

30. The Supreme Court of Vermont erred in refusing to grant the defendant's 10th motion for a verdict. This motion was as follows:

"(Palmer.) Could I add just one—And for a further reason, that the plaintiff's declaration and the theory of the Court in the trial of the cause seeks a plaintiff's recovery under the Federal Statute, and there is no evidence in the case showing that the defendant in the operation of the train in question upon which the plaintiff's intestate was killed, was engaged in interstate commerce, and an entire absence of evidence that at the time of the accident, the plaintiff's intestate was engaged in intestate commerce, as provided and required by the Federal Act of Congress and the decisions of the Court under that Act require".

"(Court.) Well, the motions may be overruled, and exceptions noted severally to each motion. They are severally overruled, and exception allowed to the

defendant".

31. The Supreme Court of Vermont erred in refusing to grant the defendant's *1st and 3rd motion for a directed verdict.* These motions are as follows:

"1. (Amey.) Now comes the defendant in the above entitled cause and moved this Honorable Court to direct a verdict in its favor, because upon all the evidence introduced in said cause, the plaintiff is not in law entitled to recover".

"3. Another motion for a directed verdict. Because the evidence shows that the Master was free from fault, that there was nothing which the Master failed to do which became negligent on the part of the Master, which was the proximate cause of the injury which resulted fatally".

32. With reference to motions 1 and 3 for a directed verdict for the defendant, the Supreme Court of Vermont erred in holding and deciding as follows: "Again the evidence tended to show that owing to the difference in size of the wheels engine 708 was faster than 401 and so steadily and rapidly gained upon her the night in question that with the delays of the latter, when train 708 stopped at Bethel train 401 had not reached Randolph 7.1 miles away ****** that a Railroad Company is legally bound to know and therefore in law it does know the whereabouts of all its trains. But in disposing of the case before us it is not necessary to consider this presumption for respecting the night of the collision the evidence showed that the train dispatcher through reports required by the rules of the Company to be given him immediately by the telegraph operators at the different stations on the different lines of the time of arrival and departure

of all trains, was informed of the position of these two trains as they passed north from White River Junction to the place of the accident. Having such information the train dispatcher knew that when train 708 left Bethel 401 was less than 7.1 miles ahead, and he must have known that as the two trains were proceeding it was inevitable that the rear train would shortly overtake the other unless steps were seasonably taken to prevent it, and being Vice Principal his knowledge in these respects was the knowledge of the defendant * * * * * * * * *
It cannot be said as a matter of law * * * *
That the defendant so dealt with the problem before it as not to expose the intestate as to perils against which he might have been guarded by the exercise of the requisite degree of care on its part.

33. The Supreme Court of Vermont erred in refusing to grant the defendant's 7th motion for a directed verdict which is in the following language. "Because the declaration states that the plaintiff's intestate was injured by a cause of injury unknown to him, that he did not know and comprehend the danger in which he was placed at the time he received his fatal injury, while the evidence does not show that, hence the plaintiff has fallen short of the allegation in his declaration in a vital and material matter."

34. The Supreme Court of Vermont erred in refusing to consider and grant original request to charge Nos. 1 to 12 inclusive and the additional *requests to charge,* Nos. 1, 5, 6, 7. This the Court did in the following language. "Defendant made twelve requests to charge which excepted to the charge as follows: For the failure of the Court to charge as requested in original requests, Nos. 1 to 12 inclusive and

for failure to charge as requested in additional requests Nos. 1, 5, 6, 7 and 11, and the exceptions were allowed severally so far as the charge did not comply with said requests and so far as said requests were material and stated a correct proposition of law, because the Court omitted to say, etc., particularly specifying certain omissions to charge numbers and parts of the charge given".

"*These exceptions other than those particularly specified are too general for consideration.*"

The requests to charge which the Supreme Court of Vermont refused to consider are as follows:

(1.) "This action purports to be brought under the Federal Employers' Liability Law but the essential elements necessary to bring the action within that law have not appeared in evidence nor are they apparent in any way upon the face of the record". The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(2.) None of the essential propositions for recovery or essential items of negligence on the part of the defendant, set out in the plaintiff's declaration, have been established. The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(3.) There was no evidence introduced in said cause to show that the defendant company did not require its conductors, engineers, station-agents, train dispatchers and telegraph operators to observe such rules and regulations as were then and there necessary for the safety of employees; nor was there any evidence introduced to show that the defendant did not suitably equip and construct its road and railroad station at Bethel, Randolph and Braintree and did not equip its station houses, buildings and signal boards

of good and sufficient quality along its line at Bethel, Randolph and Braintree; nor was any evidence introduced in said cause to show that the defendant did not operate and maintain said stations, station houses and signal boards in a sufficient and secure manner; nor was there any evidence in this case to show that the defendant did not use proper skill in the selection and employment of servants or that it did not make proper rules and regulations and require employees to observe the necessary rules in the management and running of its trains; nor was there any evidence introduced in this case to show that the defendant did not execute and deliver to station agents and operators along said line proper orders and directions for the running and passing of trains thereon; for the movement of engines, trains and cars from dispatcher's office at St. Albans. Nor was there any evidence introduced in this case to show that the defendant did not employ reasonably skilful and competent dispatchers and operators to regulate and report the movement of trains; nor was there any evidence introduced in this cause to show that it has been in years the custom of this defendant to direct station agents, telegraph and telephone operators, conductors and engineers, as to the location of its trains going in the same direction along said railroad, or to inform and advise trains going along on said railroad, or to inform and advise trains going along on said railroad in the same direction of the location of each other; nor was there any evidence introduced in said cause to show that the defendant failed to securely construct and maintain its engines, cars and trains; nor was there any evidence introduced in said cause to indicate that said defendant carelessly and negligently operated and maintained engine 708 at the time of this accident. The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(4.) All the counts, except one, in the declaration allege a lack of knowledge on the part of the plaintiff's

intestate, that any train was following or that his train might be in danger. This is an essential element of the declaration and must be proved; it has not been proved and, therefore, the plaintiff is not entitled to recover. The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(5.) The rule of damages in the declaration purports to be governed by the law of the State of Vermont and recites the substance of the Vermont Statute Law now existing upon the subject of the Recovery of Damages. The declaration purports to be under the Federal Employer's Liability Law. One law for substantive recovery and another law for the distribution of damages cannot stand together in the same declaration, for by the Federal Law, the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the law of Vermont, the grandchildren would take it all, to the exclusion of the parents. By the Federal Law, in case there were no widow, or husband, grandchildren or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont law, the next of kin would receive as provided for the distribution of personal estate without regard to their dependency upon the deceased. The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(6.) The evidence conclusively shows that the railroad company at the time of the fatal injury to the plaintiff's intestate, was operating under Standard Rules; that those rules are the most conducive to safety; that the plaintiff's intestate was killed because of a gross violation of these rules; that his sole negligence was the proximate cause of the injury,—hence the plaintiff cannot recover.

(7.) The evidence shows that the Master was free from fault with reference to the care of engine 708.

(8.) This case is under the Federal Employer's

Liability Law, but the declaration does not so state, and the replication purporting to be an amendment to the declaration, does not bring the matter within the purview of this Federal Law, hence to render a verdict for the plaintiff under the pleadings as they now stand would be in violation of the Fourteenth Amendment to the Federal Constitution, which forbids the taking of property without due process of law and guarantees to everyone equal protection of the laws. The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(9.) The evidence conclusively shows that engine 708 was reported to the Master for repairs; that repairs were made, hence, so far as the condition of engine 708 on the morning in which the plaintiff's intestate received his fatal injuries, the defendant is free from fault. The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(10.) It has been conclusively shown that the defendant company at the time the plaintiff's intestate received his fatal injuries, was operating under the Standard Rules, that they are in universal use throughout the country; that they have been adopted after careful investigation by the best railroad experts. The evidence shows also without dispute that these rules were not observed by the plaintiff's intestate at the time he received his fatal injury. The Supreme Court of Vermont erred in refusing to consider and grant the above request.

(11.) When a railroad company has deliberately adopted a system of Rules, which have been made familiar to its employees and its railroad is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the Court, because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient. There is no dispute but what Rule 99 and 91

are Standard Rules; that they were in force at the time of this accident, and the plaintiff so understood it: These rules have been established by the best railroad experts in the country, and being the result of large experience of the best railroad authority from the undisputed evidence received in this case, and it having been stated without dispute that as a result of this experience, Rule 99 and 91 are safer than notice from stations on the line of the position of trains running in the same order, it was no negligence on the part of this defendant to run its two extras as it did in this case on the night of January 11 and morning of January 12, without receiving messages at different stations between White River Junction and the scene of the accident.

(12.) It was the duty of the plaintiff's intestate, under the rules in force at the time of the injury to have flagged by means of torpedoes and fusees train 708 to prevent its colliding with 401 at Randolph and to have put out fusees at intervals between Randolph and the place of the accident. This he did not do.

(1.) The amount of recovery in this case is not to be determined by the number of children of the deceased intestate, for whose fatal injuries this suit is brought.

(2.) The jury should find the actual earning power of the deceased and fix for this purpose an annual income and should in estimating damages take into consideration the expectation of life which is estimated to be thirty-three years, and should also consider that this money would not if he had lived, have been paid at once, but would have been paid from year to year, and the last annual sum would not be paid for thirty-three years hence.

(3.) Jury should take into consideration present worth of the fair annual compensation of the deceased,

and should consider that an amount of money payable in three-three years from date or from his decease is not anywhere near of as great value as the same sum payable now.

(4.) Notwithstanding the jury may find that engine 708 was leaking steam so that the engineer could not see tail lights of 401 at the time of the accident, if the proximate cause of the injury was the failure of the Flagman White properly to put out fusees and torpedoes according to the company's rules, this plaintiff cannot recover.

35. The Supreme Court of Vermont erred in refusing to consider and to grant the following *motions for a directed verdict* for the defendant.

(4.) There was no evidence introduced in said cause to show that the defendant company did not require its conductors, engineers, station agents, train dispatchers and telegraph operators to observe such rules and regulations as were then and there necessary for the safety of employees; nor was there any evidence introduced to show that the defendant did not suitably equip and construct its road and railroad stations at Bethel, Randolph and Braintree and did not equip its station houses, buildings, and signal boards of good and sufficient quality along its line at Bethel, Randolph and Braintree; nor was any evidence introduced in said cause to show that the defendant did not operate and maintain said stations, station houses and signal boards in a sufficient and secure manner; nor was there any evidence in this case to show that the defendant did not use proper skill in the selection and employment of servants or that it did not make proper rules and regulations and require employees to observe the necessary rules in the management and running of its trains; nor was there any evidence introduced in this cause to show that the defendant did not execute and deliver to station agents and operators along said line proper orders and directions for the running and

passing of trains thereon; for the movement of engines, trains and cars from Dispatcher's office at St. Albans. Nor was there any evidence introduced in said case to show that the defendant did not employ reasonably skillful and competent dispatchers and operators to regulate and report the movement of trains; nor was there any evidence introduced in said cause to show that it has been in years the custom of this defendant to direct station agents, telegraph and telephone operators, conductors and engineers as to the location of its trains going in the same direction along said line or to inform and advise trains going along on said railroad in the same direction of the location of each other; nor was there any evidence introduced in said cause to show that the defendant failed to securely construct and maintain its engines, cars and trains; nor was there any evidence introduced in said cause to indicate that said defendant carelessly and negligently operated and maintained engine 708 at the time of this accident.

(6.) The rule of damages in the declaration purports to be governed by the Law of the State of Vermont and recites the substance of the Vermont Statute Law now existing upon the subject of the Recovery of Damages. The declaration purports to be under the Federal Employer's Liability Law. One law for substantive recovery and another law for the distribution of damages cannot stand together in the same declaration, for, by the Federal Law the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the Law of Vermont, the grandchildren would take it all to the exclusion of the parents. By the Federal Law, in case there were no widow, husband, children or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont Law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased.

(7.) The evidence conclusively shows that the Railroad Company at the time of the fatal injury to the plaintiff's intestate, was operating under the Standard Rules; that those rules are the most conducive to safety; that the plaintiff's intestate was killed because of a gross violation of these rules; that his sole negligence was the proximate cause of the injury, hence the plaintiff cannot recover.

36. The Supreme Court of Vermont erred in refusing to sustain the exceptions taken to the charge of the trial court. These exceptions and the decision of the Supreme Court upon them appear in the following language:

The defendant's exception taken to the charge of the Court is as follows:

(1.) "Because the Court omitted to say, that if the jury found 708 defective, but that that defect was not the proximate cause of the injury, then the defective condition of 708 would be eliminated from the case".

The decision of the Supreme Court of Vermont was as follows:

"This exception cannot be sustained. We have already seen that the defective condition of that engine by way of leaking steam was one of the circumstances to be considered by the jury in determining whether the defendant was guilty of negligence in not notifying train 708 concerning train 401, with such orders as might reasonably be necessary to prevent a collision. Hence the defective condition of engine 708, though found not to be the proximate cause of the accident, would not by reason thereof necessarily be eliminated from the case".

The Supreme Court of Vermont erred in refusing to sustain the above Exception. The defendant's ex-

ception taken to the charge of the Court is as follows:

(2.) To what the court said, that "if the jury found that the defendant followed the rules, but there was a better way, then the defendant still might be negligent". This exception points to the latter part of the following paragraph in the charge:

"The defendant, as well as the plaintiff, has used as evidence in this case, some *of the rules of* the defendant company, tending to show that the defendant was following those rules at the time of the accident, and that those rules were such as were in general use by railroads throughout the country. They have been denominated in the course of the trial *as general rules*. If you find such to be the fact, that would be evidence tending to show that the defendant was operating the train at the time of the accident in a prudent manner, if you find that he (it) was following those rules and adhering to them, but if the conditions were such on the occasion of this accident that a prudent man ought and would have foreseen the accident might and probably would happen, if those rules were followed, it would be negligence on the part of the defendant to follow them if there was any reasonable way in which to operate train No. 708 for it to avoid such accident".

The decision of the Supreme Court of Vermont was as follows: "With the latter part of this portion of the charge the defendant has no reason to complain. It is held in an earlier part of this opinion that rule 221 was applicable to train 708 when it stopped at Bethel and that by the requirements thereof the clearance card given to that train should have been filled in to show the time when the next train ahead (No. 401) left Bethel and that it had not yet reached Randolph. By the undisputed evidence the clearance card was not so filled in. Consequently thenceforward the defendant, in operating train 708, was not following the rules and adhering to them". The Supreme Court of Vermont erred in refusing to sustain the above exception.

The defendant's exception taken to the charge of the Court is as follows:

(3.) "To what the court said when he said it was the plaintiff's duty to determine whether the train was making the speed required, whether the train was liable to be overtaken by another train, upon the ground that the rules are positive about that, and there was no room left for discretion under the circumstances on the part of the plaintiff's intestate".

The decision of the Supreme Court of Vermont was as follows:

"One of the defendant's requests to charge was, "It was the duty of the plaintiff's intestate, under the rules in force at the time of the injury to have flagged by means of torpedoes and fusees train 708 to prevent its colliding with 401 at Randolph and to have put out fusees at intervals between Randolph and the place of the accident. This he did not do." In charging upon this subject the court told the jury they were to determine what the duty of the intestate was for the protection of train 401, and his duty, as claimed by the defendant, was largely to be gathered from its rules. The court proceeding:

"Rule 36 provides as follows: 'A red or yellow fusee, as the case may require, will be used for protection of a train which is not making the speed required by schedule or train order, and is liable to be overtaken by a following train.' We construe that rule to mean that it was the duty of the plaintiff's intestate, as rear brakeman of that train, to put out a fusee when certain conditions existed, and the rule being a command to him, that it was his duty to determine that question, that is, it was his duty to determine whether train 401 was making the speed required by the train order, as there was no schedule time, and that also he was to determine whether it was liable to be overtaken by a following train. If the train was not making the speed required by the train order, and that train was liable

to be overtaken by a following train, and he as a careful prudent man ought to have known that, then it was his duty to put out fusees between Randolph and the place of the accident, but before he was called upon to do this, these conditions must have existed, that the train was not making the speed required by the train order and that he, as a prudent and careful man, knew or ought to have known that the train was liable to be overtaken by a following train".

"The effect of this charge was to place the responsibility of protecting the rear end of train 401 upon the intestate, if the train was not making the speed required by the order and was liable to be overtaken by a following train. So far the charge was in substantial compliance with defendant's request, and no exception was taken thereto. The further charge in connection therewith that the determination of whether such conditions as to speed of the train and liability of being overtaken by a following train as by the rule to require such protection, was with the intestate upon what he as a careful and prudent man knew or ought to have known, was but the *legal consequence* of the preceding part of the charge in accordance with defendant's request and not excepted to. The care and prudence of a careful and prudent man in like circumstances has so often been laid down as the rule of diligence required, that citation of authorities is unnecessary. It necessarily follows that with the latter part of the charge thus given the defendant can have no reasonable ground of complaint". The Supreme Court of Vermont erred in refusing to sustain the above exception.

The defendant's exceptions taken to the charge of the Court is as follows:

(4.) "To the construction which the court placed upon rule 99, wherein the court said, 'If a train is stopped and delayed on the main line,' "and" to what the court said about rule 99, because the rule conveys the

fact that when a train is stopped on the main line it is an absolute duty under all circumstances for the flagman to protect his rear by fusees and torpedoes".

The decision of the Supreme Court of Vermont was as follows:

"Following the taking of these exceptions, the court gave a supplemental charge on the same subject, to which no exception was saved, *thus curing the defect,* if any there was, in the original charge". The Supreme Court of Vermont erred in refusing to sustain the above exception.

The defendant's exceptions taken to the charge of the Court is as follows:

(5.) "To the charge of the court where it said in substance that plaintiff's intestate claims that the defendant had no right to run engine 708 in the condition it was, if the jury so found she would be entitled to recover".

The decision of the Supreme Court of Vermont was as follows:

The part of the charge to which this refers was:

"The plaintiff claims that her intestate did all on that occasion that his duties under the rules and under his employment required, but that because of the negligence of the defendant, as claimed by her, this accident occurred and her intestate lost his life. She claims further that although you (the jury) might find that the defendant was following these rules on the occasion in question, that because of the condition of engine 708, the defendant had no right to run train No. 708 as it did run it, and that it had no right to follow those rules in view of the condition of engine No. 708 leaking steam as she claims it did. If she has made out those claims by a fair balance of the evidence, and the claims which she makes before you, then she is entitled to re-

cover although you may find that her intestate was also negligent and that that negligence contributed to his death".

It is said in defendant's brief that there was no further charge with reference to proximate and remote cause. Considering this part of the charge, as it should be, in connection with what the court had already instructed the jury, it is not subject to the criticism made. The court had previously charged that in order for the plaintiff to recover, not only must she establish that the defendant was negligent, but she must also establish that that *negligence proximately contributed* to the death of her intestate, or was *the proximate cause of it;* that the burden was upon her to make out a cause of action against the defendant; that "She claims that the defendant was negligent in the operation of train drawn by engine No. 708" etc.; that it was the duty which the defendant owed to the intestate and all the other employees on train 401, to operate train 708 in a careful and prudent manner, as it would have been managed by a careful and prudent man, so as not to do injury to its servants on train 401; that it was not enough to prove that the accident happened, but the question for the jury to determine was whether the defendant was negligent, and whether that negligence proximately contributed to the death of the intestate, or was the proximate cause of it. Then follows:

"The plaintiff claims that the negligence of the defendant, which caused the death of her intestate, was the running of train No. 708 with its defective engine; that it never should have run that train from the station at White River Junction; that it was negligent in that it did not give such warning to train No. 708 and train 401 as it ought to have given in the circumstances

of the case, in consideration of the condition of engine No. 708; that engine 708 was not in proper condition and was not suitably and properly equipped, and to recover in this suit, she must make out this negligence which she claims".

"In giving the part of the charge complained of, it was not necessary *for the court to repeat in detail all* the elements it had before stated as necessary for the plaintiff to establish in order to entitle her to recover, and particularly so, since the negligence claimed by the plaintiff regarding the defective condition of engine 708, and the running of her in such defective condition, was alluded to by the court in connection therewith. There is not the slightest ground for doubt that the court intended that the portion of the charge of which complaint is here made, should be considered in connection with that which had gone before, as above indicated, nor is there any doubt that the jury so understood it. The exception is not sustained." The Supreme Court of Vermont erred in rendering the decision last above quoted.

The defendant's exception taken to the charge of the court is as follows:

(6.) "To the failure of the Court to charge about the *contingencies of illness and loss or impairment* during the period of life, and also the contingency of death prior to the time limit of expectation".

The decision of the Supreme Court of Vermont was as follows:

"Evidence was introduced showing the intestate's age at death, his previous condition of health, his habits, earning capacity, etc., together with the expectancy of life of a man of his age, according to the American Experience Table of Mortality. On the question of damage the court charged, among other things, as follows: "In determining what he (intestate) is worth to the family, you should consider his actual earning power, and

you should take into consideration his power to earn for the length of time that he may be expected to live," etc. Thus under the charge the jury were to consider the intestate's earning power during the term of life expectancy, which consideration involved the probabilities as to his health and physical condition. We think the charge was sufficiently explicit in this respect." The Supreme Court of Vermont erred in rendering the decision last above quoted.

The defendant's exception taken to the charge of the Court is as follows:

(7.) "To the charge *that the burden was on the defendant* to show that the intestate was negligent in not depositing torpedoes and fusees in rear of his train".

The decision of the Supreme Court of Vermont was as follows:

"The portion of the charge here challenged was in effect that on the question of the Intestate's contributory negligence the burden of proof is with the defendant. It is said by defendant that under our holdings it devolved upon the plaintiff to show the intestate free from fault. There can be no question but that the rule in this State in actions for negligence based upon State law is as stated by the defendant. This case, however, is brought upon an Act of Congress regulating the liability of employers engaged in interstate or foreign commerce for injuries received by their employees while engaged in such commerce, and it supersedes the laws of the State in so far as the latter cover the same field. Consequently the question of the burden of proof respecting contributory negligence on the part of the injured employees is to be determined according to the provisions of that Act, and the declaration of the Supreme Court of the United States thereon controls." The Supreme Court of Vermont erred in rendering the decision last above quoted.

For which errors the defendant the Central Vermont Railway Company prays that the said judgment of the Supreme Court of the State of Vermont, dated Jan. 21, 1914, be reversed and a judgment rendered in favor of the defendant Company and for its costs.

C. W. WITTERS,
Attorney for the Central Vermont
Railway Company.

EXTRACTS FROM

DEFENDANT'S EXCEPTIONS.

(THE OMITTED PARTS RELATE TO QUESTIONS OF EVIDENCE NOT ASSIGNED.)

This was an action on the case, claimed by the plaintiff to be brought under the federal statute, to recover from the defendant for personal injuries resulting in the death of the plaintiff's intestate, Enoch L. White, on the 12th day of Jan. 1912. The defendant denies that action is under the Federal Statute. Trial by jury at the March term of Franklin County Court, 1913 Miles, J. presiding. Verdict and judgment for the plaintiff.

Before the case came on for hearing the demurrer to the replication of the plaintiff was heard and the same was overruled and exceptions allowed severally to the defendant, and thereupon a jury was impannelled.

On the trial of said cause, the plaintiff claimed and her evidence tended to show, that she was adminis-

tratrix of the estate of Enoch L. White, late of St. Albans, deceased, in said county; that the defendant was a duly organized corporation, and no question was made on the trial but that at the time of the injuries complained of, it was engaged in interstate commerce between the Province of Quebec and the State of Vermont, and between said State of Vermont and the States Massachusetts, Connecticut and Rhode Island; and that the plaintiff's intestate, at the time of the alleged injury, was employed by the defendant in such commerce, as set forth in the defendant's plea.

The plaintiff's evidence further tended to show, that a rear end collision of defendant's extra freight trains, 401 and 708, occurred on the 12th day of January, 1912 at 1.05 o'clock in the morning, at a place about one and one half miles North of Randolph station, on the main line of the defendant, in which the plaintiff's intestate lost his life.

The plaintiff's evidence further tended to show that her intestate was then and there acting in the line of his duty as freight brakeman for the defendant; that he left surviving him a widow, Mary Theresa White, the plaintiff, a son, Enoch L. M. White, about eight years old, a daughter, Mary A. White, about four years old, and an unborn daughter, all of whom at the time of the trial of said cause were living, and said last mentioned child had become one year and four months old, and was named Elsie T. White.

The plaintiff's evidence further tended to show that its main line consisted of but a single track, and that on the 11th day of January 1912, at 6.12 p. m. it sent out from its station at White River Junction, destined to Roxbury, Extra 401, consisting of engine 401, a low-

wheeled engine with a train of eighteen loaded freight cars, and 16 empty freight cars; that said train, 401 proceeded under an order to meet extra 336 and 415 at West Hartford, and having met said trains proceeded Northerly under an order to meet extra 403 and No. ten at South Royalton; that said 401, in obedience to said order, waited at South Royalton from 9.20 to 11 p. m., and then proceeded northerly from South Royalton to Bethel, a distance of seven miles, where it stopped to take water at 11.52 p. m.; that it left Bethel at 12.15 a. m., and proceeded to Randolph, arriving there at 12.50 a. m., where it was stopped to receive orders; that it left Randolph at 12.54 a. m., and arrived at the scene of the accident at 1.05 a. m.; that during this journey the plaintiff's intestate had no notice or warning of any kind whatever, that 708 was following.

The plaintiff's evidence further tended to show, that the defendant on the 11th day of January, aforesaid, started extra 708 out of its station at White River Junction destined to Roxbury, over said single track occupied by extra 401, at 10.12 p. m.; that said extra 708 consisted of engine 708 of a faster type of engine than 401 and with a train of twelve loaded freight cars and 22 empty freight cars; that said extra, 708, proceeded northerly to West Hartford, where it met extra, 403 and No. 10, and thence continued to South Royalton, arriving there at 12.08 a. m., and leaving at 12.08 a. m., and without stopping continued to Bethel, arriving there at 12.30 a. m.; that at Bethel 708 received an order and clearance card, form A, and then left Bethel at 12.36 a. m., and passed Randolph at one o'clock a. m. without stopping, and arrived at the scene of the accident at 1.05, that during this trip,

extra 708, had no knowledge and received no notice and no warning of 401 on the track ahead of them; that the clearance card, form A, received by the conductor and engineer of 708, at Bethel, contained a blank space in which to insert the information that the next train ahead was extra 401; that it left Bethel at 12.15 a. m., and its arrival at a station northerly, and time of arrival thereat, which clearance card contained the direction shown therein, and said card is referred to and made a part of these exceptions.

The plaintiff's evidence further tended to show, that automatic block signals were not in service on the defendant's road, and that station block was in service; that said blank spaces provided in said clearance card were not filled out, and a dash was made in the spaces so required to be filled out; that the arrival and departure of these two trains was communicated by telegraph or telephone to the train despatcher of the defendant at St. Albans, and the defendant knew, that extra 401 had left Bethel at 12.15 when extra 708 arrived at Bethel at 12.30; that 708 had been overtaking 401 so rapidly that it had made up practically four hours difference in their leaving time at White River Junction; that the defendant knew, or ought to have known, that extra 401 was between Bethel and Randolph when extra 708 was permitted to leave Bethel, and that at the rate of speed the two trains had travelled from White River Junction, that 708 was bound to overtake 401 very quickly, and unless 708 were stopped at Randolph; that the defendant knew, or ought to have known, that the station block of five minutes was not adequate protection for these two trains in the circumstances, and that the defendant provided no rules requiring the giving of orders

to these two trains respecting their relative positions other than the clearance card Form A., which was not filled out. That no orders were issued by the defendant to these two trains respecting each other.

That the time in question was a clear, cold, moonlight night, and the track from Randolph to the scene of the accident was slightly upgrade, and from the scene of the accident for half a mile towards Randolph, the track was straight; that under normal conditions of running an engine, the engineer of extra 708 could have seen the tail lights of 401 soon enough to have prevented the accident. That engine 708 before it left White River Junction was leaking steam from places where normally an engine does not and should not leak steam, to such an extent that the engineer could not see by the front of the engine, and required the brakeman to ride on the pilot to line up the switches in the yard at White River Junction, because he could not otherwise see the switch lights on account of the steam.

The plaintiff's evidence tended to show, also, that said steam continued to leak from places on said engine where it was not proper for steam to escape, so that all the way from White River Junction to the scene of the accident, the engineer of 708 could not see ahead by the engine, except at such times as a draft of air might move the cloud of steam from his view, and that the steam leaked so much that one could hardly see across the cab of the engine from the fireman's seat to the engineer's seat; that engine 708 had been leaking steam from the right valve stem, which was in front of the engineer's seat and at the front end of the engine, from the 18th of December, 1910, and that every trip that the engineer of 708 took on said engine

from January 5 to the date of the accident, said right valve stem leaked, and that the engine leaked improperly steam from other places thereon; that the reason why the engineer of 708 did not see the tail-lights of 401 in time to prevent the accident was because of said steam so improperly allowed to leak from various parts of said engine.

The plaintiff's evidence also tended to show that extra trains have no schedule time, and are run only upon written orders issued by the train despatcher to the conductors and engineers, and read by them to the other members of the crews; that these orders are transmitted by telegraph or telephone to operators at stations along the line, and by them transcribed and delivered to the addressees. The plaintiff's evidence tended to show that the average speed of freight trains and the rate at which the wages of train operator are paid, is ten miles an hour, and that the speed of 401 when the accident happened, was about 12 miles an hour (Transcript 79); that 401 had started from Randolph at a standstill and had been gaining momentum and speed all the way to the scene of the accident.

The plaintiff's evidence also further tended to show that the plaintiff's intestate was in the exercise of due care, and was performing his duty at the time and place in question; that he, the plaintiff's intestate, was not guilty of any negligence contributing to the injury; that no circumstances had arisen, no knowledge, or information or notice had come to the plaintiff's intestate to cause him to alight from the train or in any other manner to protect the rear end of said train.

The plaintiff's evidence tended to show that at the

time of the injury extra 401 was not stopped or delayed on the main track under circumstances in which any person on said train would have reason to believe that it might be overtaken by another train; that at the time of the injury extra 401 was travelling a little faster than the average rate of freight trains, and that during its entire trip from White River Junction to the scene of the accident, the only stops it had made were in obedience to orders for that purpose; that when said train stopped at Randolph to receive orders that the plaintiff's intestate was seen to set forth with the necessary signals back from the rear of said train to protect the train in the usual manner, and that her evidence tended to show that he fully performed his duty.

The defendant claimed and its evidence tended to show that the trains concerned in the collision which resulted in the death of the intestate were No. 401 and 708, and that both were extra freight trains; that 401 had 18 loaded cars and 16 empties, and 708 had 12 loaded and 22 empties; that 401 was a low wheeled compound and 708 was a high wheeled compound; that low wheeled engines are a slower type than the high wheel; that low wheeled engines are often used on manifest trains, that they are capable of considerable speed; that there is not much difference between their speed and that of a high wheeled engine; that low wheeled engines are built for strength, but that they get over the road very well; that steam was escaping from engine 708 on the night of the accident; that the forward brakeman on 708, who was in the cab for the greater part of the time from White River Junction to the scene of the wreck, on leaving White River Junction, had to ride on the pilot to line up the

switches in the yard because of the density of the steam; that it is more convenient to line up switches from the pilot than to stay in the cab when doing it; that it is not extraordinary for steam to come out of an engine on a cold night; that some steam would escape on such a night; that the night of the accident was very cold and that on a very cold night steam shows up more plainly, and a very little steam will show on such nights; that it is not an extraordinary situation for steam to come out from around a normal engine; that it is not infrequent that steam escapes from around the piston rod; that steam also normally, comes out of an engine through the smoke stack and the escape valves; that some steam comes out of an engine every time the piston moves, and also comes out of an engine properly through the pop valves and cylinder cocks; that there are forty main lines switches between White River Junction and the scene of the wreck; that all these were lighted on the night of the accident and the lights were seen by engineer McDonald from the cab of 708 on that trip before he passed over them; that if a switch is set for the main line, green color shows; that if set for the siding, red shows; that red is more easily seen than green; that switches were all open for the main line on the night of the accident; that 708 on the night of the accident was a free steaming engine; that steam obstructed the view of the engineer at times; that the safety valves would open quite often; that under ordinary circumstances the steam sometimes obscured the view when an engine is all right; that engine 708 was an A-No. 1 engine and had recently come from the shops; that an engine will run from 75,000 to 100,000 miles, and sometimes as high as 150,000 miles between shops; that 708 was equipped with the best

known appliances; that on Nov. 30th, 1911 engine 708 was overhauled and was practically the same as new when it came out of the shops; that engines are not only overhauled, but when they come out of the shop the travelling engineer rides them first; that the frequency of general overhauling depends upon the work done; that more repairs are required in cold weather, and steam leaks more freely in cold weather on account of contraction; that when an engine comes in from a trip, necessary repairs are booked by the engineer over his signature in a book kept for that purpose in the locomotive foreman's office; that when repairs are made a statement to that effect is written on the opposite page by the person supervising the repairs and over the signature of the person actually making them; that it was not possible with traffic conditions as they existed on Jan. 12, 1912 or thereabouts, on the Central Vermont Railway, to keep engines in repair so that steam would not leak; that there was no way to prevent a normal engine in a normal condition from leaking steam; that an engine might be started from a terminal without any apparent leakage, but before arriving at next terminal a leakage might appear; that engines are more liable to leak in cold weather on account of contraction; that required repairs had been made on 708 from time to time, the last on Jan. 10, prior to the accident; that the crews of each of the trains involved in this accident consisted of an engineer, fireman, conductor, brakeman and rear flagman; that F. A. Pinkston was the engineer on 401 and L. O. Gibbons the conductor; that D. A. McDonald was the engineer on 708 and W. L. Wright was the conductor; the plaintiff's intestate was the flagman on 401 and was an experienced man in that capacity and had always

been faithful and capable in his work and understood the use of torpedoes and fusees and of other flagging utensils; that during Dec. 1911 and Jan. 1912, to the time of his fatal injuries, the deceased was a flagman on trains between St. Albans and White River Junction on the route over which he was going at the time of the injury; that during this time the traffic was heavy; that in Jan. 1912 over this route there were 486 South bound trains and 514 North bound trains; that the distance apart of stations involved in this case are as follows: from White River Junction to West Hartford, 7.6 miles; from West Hartford to Sharon, 5.7 miles; from Sharon to South Royalton, 5 miles, from South Royalton to Royalton, 2 miles, from Royalton to Bethel, 5 miles, from Bethel to Randolph, 7.1 and from Randolph to place of accident, 1.8 miles; that train 401 left White River Junction at 6 p. m. and arrived at South Royalton at 9.20 p. m.; that it left South Royalton at 11 p. m. and arrived at Bethel at 11.52 p. m.; that it left Bethel at 12.15 a. m., and arrived at Randolph at 12.50 a. m.; that it left Randolph at 12.54 a. m. and arrived at the scene of the accident at 1.07 a. m.; that train 708 left White River Junction at 10.12 p. m. and arrived at South Royalton at 12.08 a. m.; that it left South Royalton at 12.08 a. m. and arrived at Bethel at 12.30 a. m.; that it left Bethel at 12.36 a. m. and arrived at Randolph at 1 a. m.; that it left Randolph at 1 a. m. and arrived at the scene of the accident at 1.07 a. m.; that 401 also stopped at West Hartford thirty five minutes or forty minutes and 708 stopped at West Hartford three or four minutes; that in going from Royalton to Randolph the grade is mixed, there being some level places and some stiff grades, being up grade North from Bethel and

slight grade coming North from Randolph; that the average speed of extras is 20 miles per hour, maximum 30 and minimum 15 miles per hour; that extras are all of equal rank and may pass each other on the road without orders; that no notice was given to either of these trains of the location of the other during the trip, except as follows: that conductor Gibbons saw a message at South Royalton stating that 708 would meet 403 and 10 at West Hartford; that trains 403 and 10 were South bound, 403 being an extra and 10 a passenger train which stopped at West Hartford within its schedule; that no torpedoes or fusees were used by flagman, White, for the protection of the rear of 401 between White River Junction and the place of the accident; that just before the collision he was sitting beside the stove in the van lighting his pipe; that conductor Gibbons was in the monitor; that engineer McDonald of 708, when he came up the line that night behind 401, was not looking for the tail lights of the preceding train, that he was looking for the torpedoes and fusees, and that, if the proper signals had appeared he would have seen and heard them, being fusees and torpedoes; that torpedoes make a loud noise when exploded; that the Central Vermont Railway was operated under standard rules; that the standard rules were adopted by what is known as the American Railway Association; that these rules were adopted by railway managers and officials for the purpose of obtaining a uniform system of operation in railway service and the safest method of operation; that rule 99 was a standard rule and was in force on the Central Vermont Railway at the time of the accident, and for the contents thereof the same is referred to and made a part of these exceptions; that torpedoes

are made to clamp on the rail and to explode when the locomotive wheels strike them; that it is not practical for trains to be notified at stations of the location of other trains on the road going in the same direction, as it is impossible at all times to tell where they are located; that the cards of notification and the enforcement of rule 99 would lead to divided responsibilities and parties would become more negligent; that the clearance card is used in connection with rule 91, Exhibit C., and is for the purpose of keeping trains apart and requires them to be kept apart 5 minutes; that there was no non-observance of rules 103, 220, 221, 222 and 324 on the night of the accident; that there are not automatic block signals on the Central Vermont, and extras do not travel on schedule; that the plaintiff's intestate was negligent which contributed to his injury, in that he failed in not leaving torpedoes and a fusee at Randolph, even if they were moving very slow all the way from Randolph to the point of the accident, that if 401 was moving slow then intestate should have left additional fusees and if it slowed down to the point where it became dangerous, he should have got off the train with proper signals to protect the train and placed torpedoes on the rail; that he neglected his duty in not going back a distance required by the rules at Randolph and placing torpedoes on the rail and leaving fusees burning.

Before the deposition of W. E. Lamson was introduced by the plaintiff the defendant objected to the introduction of any evidence, for the following reasons:

(a.) Because it cannot be determined from the declaration whether the defendant is asked to respond

to an action for injuries under the statutes of the state, or whether he is asked to respond for injuries under the Federal Statutes.

(b.) If the plaintiff is seeking to recover under the Employers' Liability Act, there is not sufficient allegation in the plaintiff's declaration to entitle her to offer proof and subject the defendant to the payment of damages for the violation of that act, and the shortage in this regard is in no legal effect remedied by the plaintiff's replication to the defendant's plea in bar.

(c.) Because the allegations of the plaintiff's declaration did not state facts sufficient to constitute a cause of action against this defendant under the Act of Congress, known as the Employers' Liability Act, and to allow the plaintiff to offer proof, under her declaration, because of the facts stated in her replication to the defendant's plea in bar would work a departure from fact to fact and from law to law, and the rights belonging to the defendant in his defense to the action as instituted would not be available to them if the cause is allowed to proceed under the so-called replication to the defendant's plea in bar.

(d.) Because the Employer's Liability Act of Congress in force at the time of the pretended wrongful acts complained of in the plaintiff's declaration is a plenary statute in contravention of the common law, and the facts stated in the plaintiff's declaration not being sufficient to bring this action within the provisions of this act, this court acquires no jurisdiction of the subject matter, and the plaintiff's evidence, now being offered, is not in support of any issue lawfully before this court for adjudication, under any sufficient statement of facts to constitute a cause of action under such act of Congress.

(e.) And further because the declaration nowhere charges that the train upon which the plaintiff's intestate was employed at the time of the accident, was engaged

in interstate commerce and nowhere charges that the plaintiff's intestate was at the time of the accident engaged in a service relating to or promoting interstate commerce, but said declaration does attempt to charge the defendant with negligence in the transaction of both intrastate business as regulated by the state of Vermont, and its interstate business as regulated by the laws of Congress.

These objections were overruled, and an exception was allowed the defendant.

The following exceptions were taken during introduction of plaintiff's testimony.

(14.) Witness (Wright conductor of 708) testified that he received a 19 order at Bethel, and that he delivered the order to Engineer McDonald, and after making the order complete the train proceeded and that with this order there was a clearance card for McDonald delivered to him; that it did not contain on it, that is, any report of any train ahead.

Against the objection and exception of the defendant on the ground that rule 221 does not apply under the circumstances of this case, the witness was allowed to answer in response to the following question:

Q. That is to say, was there any notice to you on that clearance card, according to this rule 221 and Form A, that the next train ahead was 401, and the time that it left Bethel, was that in there?

And the witness answered:

A. I don't think it was.

Rule 221 is referred to and made a part of these exceptions as is clearance card "A".

[Rule 221.

A fixed signal must be used at each train order office which shall indicate "Stop," when trains are to be stopped for train orders. When there are no orders, the signal must indicate "Proceed," except as provided in Rule 91.

When an operator receives the signal "21," or "19" followed by the directions, he must immediately display the "stop" signal for the direction indicated, and then reply "Stop displayed," adding the directions; and until the orders have been delivered or annulled, the signal must not be restored to "Proceed," except by train order.

A TRAIN STOPPED BY A TRAIN ORDER SIGNAL MUST NOT PROCEED WITHOUT A CLEARANCE CARD FORM A OR A CAUTION CARD FORM C, ALTHOUGH TRAIN ORDERS MAY HAVE BEEN RECEIVED.

Operators must have the proper appliances for hand signaling ready for immediate use if the fixed signal should fail to work properly. If a signal is not displayed at a night office, trains which have not been notified must stop and ascertain the cause, and report the facts to the Superintendent from the next open telegraph office.

For Form A see Decision Appendix p. 54.]

(18.) During the examination of Mr. William L. Wright (Plaintiff's witness) who was conductor of 708 on the night of the accident, the following exceptions were taken:

During the cross examination by the defendant the following question was asked:

Q. And supposing you were delayed on sidings

and after you got back on the main line, a lot of time is lost, how do you protect your rear end?

Objection was made by the plaintiff to this question and the following discussion ensued:

Court: That is hardly cross examination, that we think, Mr. Amey, as has been suggested, it would be proper matter of defence, but we hardly think it is cross examination or anything that came out in the direct examination, now you directly point to how that he should protect the rear end of his train, I am inclined to think that that is not cross examination.

Mr. Amey: Well, inasmuch as the direct examination was attempting to bring out the fact that we were not exercising due care I thought that I had a right to ask any question that would indicate that we were.

Court: Well, do you wish to show, as you inquired, to show that you were using due caution in protecting the rear end of the train?

Mr. Amey: I mean the Company, I do not mean the plaintiff.

Court: I am inclined to believe that this is not cross examination and I will exclude it as such, but not exclude it as not being admissible when properly offered.

Mr. Amey: Well, I would like to make an offer.

Court: You do not have to on cross examination, but you may make it and we will hear the offer all the same.

Mr. Amey: I think I have stated to the Court that this witness claims there was no warning whatever

between White River Junction and the scene of the accident, and I am trying to find out from him what warning should be given when the trains are in proximity.

Court: Well that would hardly be cross examination, we will adhere to our ruling, we don't exclude the evidence as evidence in its proper time, but we simply exclude it at this time.

Exception by the defendant.

The witness on direct examination had not testified as to how the rear end of a train shall be protected in any circumstances.

In the direct examination Mr. Wright testified that he was a conductor, had been a conductor for eighteen years and had railroaded for about twenty years.

That he started out of White River Junction at 10.12, that he met passenger train No. 10 and extra 403 at West Hartford, that he was there probably three or four minutes and then ran to Bethel, received an order at Bethel and a clearance card.

That there was no stop after leaving Bethel, that he had no notice whatever that train 401 was ahead of him, that he did not believe that he was going to meet a freight train upon the track up between Randolph and Braintree, that he was running between twenty and twenty-three miles per hour.

That he saw no tail lights of 401 at any time before he hit them, that he had no warning or notice of any kind that 401 was ahead of him, that there was a straight track above Randolph back from the scene of the wreck for about a half a mile.

He further stated that he did not encounter anything from White River Junction to the scene of the wreck that warned him of the location of the train ahead.

(41.) During the direct examination of J. E. Fitzsimons, an expert on engines, and a master mechanic, called by the defendant, he was asked relating to 708 as follows:

Q. Can you tell the jury whether she (708) was inspected by government officials?

A. Well I cannot say if she was, positively, but if anything had been wrong—

Q. Do not tell what you do not know, Mr. Fitzsimons, but I want you to tell the jury the necessity of Government inspection for your engines.

The plaintiff objected to this question and the witness was not allowed to answer. The offer is as follows:

> "We would like to show that under the Federal law those engines all are frequently inspected and that this, among the others, was inspected prior to the time when it was used on this occasion and was found all right."

An exception was allowed the defendant.

Prior to this time the witness had stated that this particular engine was subject to inspection.

Before entering upon the trial of this cause, the defendant moved to dismiss upon the grounds stated in his motions, which are hereby referred to and made a part hereof. The same were overruled and an exception allowed the defendant.

(For said motions see Assignment appendix p. 9.)

The defendant excepted to the charge of the court as follows, viz:

For the failure of the court to charge as requested in original requests No. 1 to 12 inclusive, and for failure to charge as requested in additional requests Nos. 1, 5, 6, 7 and 11, and the exceptions were allowed severally so far as the charge did not comply with said requests, and so far as said requests were material, and stated a correct proposition of law:

Because the court omitted to say, that if the jury found 708 defective, but that that defect was not the proximate cause of the injury, then the defective condition of 708 would be eliminated from the case; to what the court said about the negligence of the defendant in following the rules, viz: that "if the jury found that the defendant followed the rules, but there was a better way, then the defendant still might be negligent; to what the court said when he said it was the plaintiff's duty to determine whether the train was making the speed required, whether the train was liable to be overtaken by another train, upon the ground that the rules are positive about that, and there was no room left for discretion under the circumstances on the part of the plaintiff's intestate; to the construction which the court placed upon rule 99, wherein the court said, "If a train is stopped and delayed on the main line"; to what the court said about rule 99, because the rule conveys the fact that when a train is stopped on the main line it is an absolute duty under all circumstances for the flagman to protect his rear by fusees and torpedoes; to the failure of the court to charge about the contingencies of illness and loss or impairment during

the period of life, and also the contingency of death prior to the time limit of expectation; to the charge of the court where it said in substance that plantiff's intestate claims that the defendant had no right to run engine 708 in the condition it was, and if the jury so found she would be entitled to recover; and to the charge of the court that it was the plaintiff's duty to determine whether 401 was making the time and whether he would be overtaken by a following train.

After the foregoing exceptions were taken, the court made a supplemental charge, as follows:

"I have said to you, gentlemen of the jury, with reference to rule 99, that if you find that train 708 was stopped *and* delayed on the main track under circumstances in which it might be overtaken by another train, etc., that it was the duty of the plaintiff's intestate to get off and deposit the fusees and torpedoes for the protection of the rear of his train. Now, I used the word 'and' instead of 'or'. I should have said 'when a train stops, *or is delayed* on the main line', and then told you that that question was a question of fact claimed one way by the plaintiff and by the defendant the other way, they claiming that it was stopped so, and that he didn't, that the intestate did not deposit the fusees, and I told you it was the duty of the defendant to make that fact out by a fair balance of evidence in order to hold the plaintiff was negligent in that particular instance."

The defendant excepted to the charge of the court, that the burden was upon the defendant to show that the plaintiff's intestate was negligent in not depositing torpedoes and fusees in rear of his train.

The charge of the court is referred to and made a part of these exceptions for the purpose of showing what the court charged in reference to the matters

therein excepted to, and omissions to charge.

(For charge see Assignment appendix pp. 74-79.

At the close of all the evidence the defendant moved for a verdict and such motions are overruled severally and an exception allowed the defendant.

(For motions see Assignment appendix pp. 13-17.)

After the verdict and before judgment the defendant moved in arrest of judgment and such motions were overruled and judgment on the verdict rendered, to which ruling and judgment the defendant was allowed an exception.

(For motions in arrest see appendix pp. 4-7.)

All the pleadings in the case, the motions to dismiss, motions for verdict, requests to charge, and motions in arrest of judgment, filed in the case, or copies thereof hereto attached, the exhibits received in evidence during the trial are referred to and made a part of these exceptions. The transcript of the evidence taken on the trial is referred to for the purpose of showing the tendency of the evidence and is to control, and may be referred to on the motions for a verdict, but need not be printed, but a legible copy shall be furnished the court for its use.

These exceptions are allowed in amendment and substitution of the bill already on file and execution stayed and cause passed to Supreme Court.

WILLARD W. MILES,
Presiding Judge.

DECISION OF SUPREME COURT OF VERMONT.

87 Vt. 330.
89 A,l. 618.

The following is a copy of Form A, Clearance Card, with explanatory note accompanying it, referred to in the opinion, as appears in defendant's Book of Rules:

Form (A)

CENTRAL VERMONT RAILWAY CO. CLEARANCE.

(B) 6.45 A. M June 5, 1911.

Train No. 12

I have orders. (5-7 and 9) (Nil) for your train. The next train ahead is (Extra 751) It left this station at 8.35 a. m., and arrived at (C) at 8.55 a. m. Signal is displayed for (Extra 576) (Block) and does not affect you.

John Jones
Operator.

This does not affect any train orders you have received.

Conductors and Engineers must each have a copy, and see that their train is correctly designated in the above form.

Note.—The numbers of orders for the train must be filled in in figures. Where there are no orders the word "nil" must be written in. If the next train ahead has not reached the next telegraph office the words "not yet" must be written in the blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type. Operators must keep the lowest copy. Where the Automatic Block Signals are in service instead of Station Block, the information relative to the train ahead may be omitted.

Argued before POWERS, C. J., and MUNSON, WATSON, HASELTON, and TAYLOR, JJ.

C. G. Austin & Sons, of St. Albans, for plaintiff. C. W. Witters, of St. Albans, Harry B. Amey, of Island Pond, and C. S. Palmer, of Burlington, for defendant.

WATSON, J. This is an action on the case, claimed by the plaintiff to be under the federal Employers' Liability Statute, but by the defendant to be under the state law, to recover for personal injuries resulting in the death of the plaintiff's intestate, Enoch L. White, on the 12th day of January, 1912. The declaration contains several counts, but in the respects essential to be noticed in disposing of this question, the allegations of all the counts are substantially alike, and may be stated with sufficient definiteness for this purpose as follows: That prior to and on the day named above, the defendant corporation was the owner and operator of a certain railroad, extending from St. Johns in the province of Quebec in the Dominion of Canada, to and through the city of St. Albans, in the state of Vermont, and through the towns of Braintree, Randolph, and Bethel to White River Junction in said state, and in connection with other lines of railroad to and through other states, was then and there engaged in commerce between several states, and between the state of Vermont and the Dominion of Canada, as a common carrier; that on the day aforesaid the intestate was engaged in the defendant's employ on its railroad as a freight brakeman, and that while thus engaged, at a certain point between the stations of Randolph and Braintree, solely by reason of the carelessness and negligence of the defendant, its agents, servants, and

employes, a collision between two of the defendant's freight trains occurred, and the said intestate, by means thereof, and solely by reason of the negligence of the defendant, its agents, servants, and employes, and without fault or contributory negligence on his part, while in the performance of his duty as brakeman on one of said trains, was instantly killed. The allegations further show that the intestate left surviving him a widow, then pregnant, and minor children, including the one yet unborn, but subsequently born alive, and that this suit is brought by the personal representative of the intestate for the benefit of said widow "and next of kin minor children, under and by virtue of the statute and laws in such case made and provided."

None of the counts contain averments showing that the train on which the intestate was engaged at the time of his injury was being operated in interstate or foreign commerce, nor that he was then employed by the defendant in such commerce, without which character of his employment there could be no right of action under the federal Employers' Liability Act. Mondou v. New York, New Haven & Hartford Ry. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Pedersen v Delaware, Lackawanna & Western Ry. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125. The defendant pleaded in bar, expressly alleging, among other things, that at the time of the happening of the several things in the plaintiff's declaration mentioned the defendant was and ever since has been a common carrier, by railroad, engaged in commerce between the state of Vermont and the state of Massachusetts and the state of Connecticut, and between the state of Vermont and the Dominion of Canada, and that at the time the plaintiff's in-

testate received the injuries complained of in the declaration, he, the intestate, was employed by the defendant, common carrier as aforesaid, in such commerce. The plaintiff replied precludi non, because, etc., iterating the said allegations in the defendant's plea, and averring that, by the laws and statutes of the United States and of the state of Vermont, the court has full and complete jurisdiction of the matters and things set forth in the plaintiff's declaration to determine according to law—concluding to the country.

[1.] Defendant demurred to the replication, because: (1) It is no answer to the defendant's plea; (2) it is a complete departure from the writ; (3) it introduced a new cause of action not contemplated in the declaration; (4) it does not support or fortify the declaration; (5) it does not present matter of estoppel to defendant's plea; (6) it does not traverse the plea; (7) it does not confess and avoid the plea; and (8) the declaration purports to recover damages under the laws of the state of Vermont, while the replication confesses that the action should be under the federal Employers' Liability Law. On hearing, the demurrer was overruled and exception saved. Thereupon a jury was impaneled, and a trial had, resulting in a verdict for the plaintiff, and judgment was rendered thereon. By thus pleading over and going to trial upon the merits, the defendant waived its demurrer. German v. Bennington & Rutland R. Co., 71 Vt. 70, 42 Atl. 972.

[2.] After verdict, the defendant undertook, by motion in arrest of judgment, to raise the same legal questions respecting the declaration with reference to the federal Employers' Liability Law, as were presented on the demurrer, though some of the assignments were somewhat different in form, one being that the declaration purports to be under the said federal statute, but contains no allegation that the defendant

was engaged in interstate commerce at the time of the injury to the intestate, nor that the intestate was then and there engaged in the promotion of such commerce, and excepted to the overruling of the motion. The rule is, however, that after judgment on demurrer by solemn determination, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer. 2Tidd's Pr. 918; Edwards v. Blunt, 1 Str. 425; Ross v. Bank of Burlington, 1 Aikens, 43, 15 Am. Dec. 664.

[3, 4.] Moreover, though the declaration lacks averments showing that the intestate at the time of his injury, was employed by the defendant in interstate or foreign commerce, yet not only was the declaration aided in this respect by the defendant's expressly averring in its plea in bar the facts omitted from the declaration and essential in order to set forth a good cause of action under the federal law (Ralston v. Strong, 1 D. Chip. 287; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526), but the matter replied by way of departure —if it was a departure, a question we do not decide— would have been a sufficient answer, in substance, to the defendant's plea had the plaintiff pleaded it in the first instance, and the verdict in favor of the party who made the departure cured the fault. The only mode of taking advantage of a departure is by demurrer, and since the defendant, instead of standing upon its demurrer, took issue upon the replication containing the departure, and it being found against the defendant, the court will not arrest the judgment, for after such finding it necessarily appears on the whole record that the plaintiff is in law entitled to judgment. Lee v. Raymes, Sir T. Raym. 86; 2 Saund. Pl. & Ev. 807; 1 Chitt. Pl. 648; Gould's Pl. c. viii. § 79; Stevens' Pl. 147; Farmers' & Mechanics' Bank v. Flint, 17 Vt. 508, 44 Am. Dec. 351. It follows that since by its plea in bar the defendant expressly supplied the omission in the declaration, essential to a good cause of action under the federal law, and since issue was joined

on the replication departing (defendant asserts) from the declaration accordingly, the defendant's objection to the introduction of any evidence because the declaration does not state facts sufficient to constitute a cause of action under that law was properly overruled.

[5.] The deposition of W. E. Lamson was used by the plaintiff. The deponent, the undertaker who prepared the body of the intestate for burial, testified to being at the scene of the accident soon after the collision. On being asked where he found the body of the intestate, he answered, subject to defendant's exception on the ground that damages for pain and suffering were not claimed, "Right up in front of the engine, on the pilot, you might say, seemed to be crowded up there." It is argued that the words "crowded up there" mean pain and suffering. But this is not so when the answer is considered, as it must be, in connection with the question asked.

[6.] It appeared that the freight train on which the intestate was engaged when killed was No. 401, hereinafter designated as 401, running extra northerly from White River Juncton, and that with it collided freight train No. 708, hereinafter designated as 708, also running extra from the same place and in the same direction. The railroad is a single track. During the direct examination of L. O. Gibbons, the conductor of 401 at the time of the accident, he was shown a paper marked "Plaintiff's Exhibit C," and various questions were asked him by way of identification of the paper as a copy of a running order out of White River Junction. These questions were objected to on the ground that there had been no showing that it was the paper the witness had on the night of the accident, that the defendant had no knowledge as to its source, and that the loss of the original had not been shown. Such evidence was received subject to defendant's exception. Upon that evidence and the evidence relating to the loss of the original and search for same, the court found that the original was lost, that the witness

had made all reasonable search for the same in the places where it was likely to be found, but was unable to find it, and that C was a copy thereof. All this appearing, C was received in evidence, subject to defendant's exception upon the ground stated. The bill of exceptions further states that substantially the same appeared with reference to plaintiff's Exhibit D and E, as appeared with reference to C, and the same objections and rulings were made and exceptions taken. The transcript of the evidence is before us for the purpose of showing the tendency of the evidence, and is to control. A careful examination of the evidence shows the court's findings to have been warranted, and the three exhibits were properly admitted.

[7.] During the examination of the same witness, plaintiff offered in evidence rule S—71 of defendant's rule book, which was objected to as immaterial. On being asked by the court to state his offer, plaintiff's counsel stated at some length their claim in that behalf, concluding by saying he did not want an exception if he could avoid it. Defendant excepted to the offer made in the presence and hearing of the jury "because the plaintiff's attorney has been testifying"; also excepted to the remarks of the attorney. Plaintiff's counsel, being requested by the court, had a right to state his offer to prove such facts as were thought to be material to the case (Chicago, etc., R. Co. v. Fietsam, 123 Ill. 518, 15 N. E. 169); and the court could permit him, within proper bounds, to state the grounds upon which he relied as justification for the offer to which opposing counsel objected (Gilbert v. Michigan Cent. R. Co., 116 Mich. 610, 74 N. W. 1010).

[8.] Nothing appears of record showing that the attorney, in making the offer and stating the grounds therefor, exceeded legitimate action. Yet to guard against harm resulting to the other side, the court, on exception being taken, told the jury that they should not consider at all, in determining any issue in the

case, what the counsel had just said to the court; that it was not directed to them, but to the court. No harm could have resulted to the defendant.

[9.] The plaintiff's attorney offered rule 324, which reads as follows: "Operators are required to keep a record of the time trains pass their stations, and be prepared to furnish information promptly to those that should receive it," the attorney stating: "We are going to show that at Bethel the operator had a record of the time 401 passed there, or rather that he ought to have had a record under this rule—it was his duty to have a record of the time 401 passed there—and that he ought to have informed himself of the approach of 708 to be prepared to furnish information to 708; and expect to show that when 708 got its clearance card at Bethel this operator drew a dash through the space where the rule says he must tell them when 401 left that station, and, knowing that that train was between Bethel and Randolph at that time, and only 21 minutes away, he gave him no information at all, omitting it from the clearance card." The rule was admitted in evidence against defendant's objection and exception on the ground that it was incompetent, irrelevant, and immaterial. In the defendant's brief, the only point made under this exception is that "the hypothesis upon which the question was asked is incorrect. There is nothing in the statement of facts to warrant the assumption that 'the rule says he must tell them when 401 left that station.' The rule does not so state." This ground of the exception was not stated in the court below, and it is not considered.

[10.] Wm. L. Wright, who was the conductor of 708 on the night of the accident, testified that he received a 19 order at Bethel, and that he delivered the order to the engineer of the train, and, after making the order complete, the train proceeded; that with this order he received a clearance card, and a copy of the same was there given to the engineer, but it did not contain a report of any train ahead. Against the

objection and exception of the defendant, on the ground that rule 221 did not apply in the circumstances of this case, the witness was allowed to testify that there was no notice to him on this clearance card, according to rule 221 and Form A, that the next train ahead was 401, and of the time it left Bethel. It is said in argument that rule 221 was in force, but that the situation on the occasion in question was governed by rule 91, which, it is said, does not require any notice in the clearance card of the freight train ahead when there is another freight train following, if the forward train has been gone five minutes. This involves the construction of those two rules, as applied to the conditions shown by the evidence. Train 401 consisting of low-wheeled engine 401 drawing 18 loaded and 16 empty freight cars, and train 708, consisting of engine 708, high-wheeled and faster than engine 401, drawing 12 loaded and 22 empty freight cars, were both sent out from White River Junction, destined for Roxbury. Train 401 left White River Junction at 6 o'clock p. m. and 708 at 10:12 o'clock p. m. By reason of delays on the road, 401 did not stop at Bethel until 11:52 p. m. It took water there and left at 12:15 a. m., arriving at Randolph at 12:50. It received a 19 order there, stating that No. 6, which was an opposing passenger train, would run so many minutes late. Train 401 left Randolph at 12:54, and arrived at the place of the accident, 1 4-5 miles farther on, at 1:07 a. m. Train 708 arrived at Bethel at 12:30 a. m., where the train order signal was out. There the train received orders and a clearance card, Form A, as stated above, and left at 12:36 a. m., passed Randolph at 1 o'clock without stopping, and arrived at the place of the accident at 1:07 a. m. The evidence tended to show that during this trip those in charge of 708 had no knowledge and received no notice or warning of 401 on the track ahead.

Automatic block signals were not in service on defendant's railroad, but station block signals were. Rule

91 is as follows:

"Unless some form of block signals is used, trains in the same direction must keep at least five minutes apart, except in closing up at stations, but a trian must not follow a train carrying passengers or operating a snowplow until a report is received of its arrival at a station ahead, except that a train may follow twenty minutes after the departure of a train carrying passengers or operating a snowplow, when either the station from which it is to follow or the next station ahead is not a telegraph station, or when communication with the train dispatcher is interrupted, and the wire failure is noted on the clearance.

"The train order signal will be used by operators to maintain the intervals required by this rule.

"Schedule speed must not be exceeded by sections of trains other than the first section, nor may a train following a train carrying passengers, exceed the schedule speed of such train unless a clearance shows arrival at a station ahead:"

And rule 221: "A fixed signal must be used at each train order office, which shall indicate 'stop' when trains are to be stopped for train orders. When there are no orders, the signal must indicate 'proceed,' except as provided in Rule 91.

"When an operator receives the signal '31' or '19' followed by the direction, he must immediately display the 'stop' signal for the direction indicated, and then reply 'stop displayed,' adding the direction; and until the orders have been delivered or annuled, the signal must not be restored to 'proceed' except by train order.

"A train stopped by a train order signal must not proceed without a clearance card Form A or a caution card, Form C, although train orders may have been received."

This rule contains a further paragraph, not ma-

terial here. A copy of the blank Form A clearance card, prescribed by the defendant's Book of Rules, and of the explanatory note accompanying it therein, appear in the statement of the case.

Since this case in no wise pertains to a train carrying passengers or operating a snowplow, the two rules quoted will be considered solely with reference to freight trains. Rule 91, relating to the movement of trains where no form of block signals is used (as in the case before us), provides that trains in the same direction must keep at least five minutes apart, except in closing up at stations, and that to maintain such interval, operators will use "the train order signal." By rule 221 this same signal must be used at each train order office, and shall be made to indicate "stop," when trains are to be stopped for train orders, and when there are no orders the signal must be made to indicate "proceed," except as provided in rule 91, which exception means, as we have seen, when the operator is required by the latter rule to stop a train in order to maintain the required interval between it and the preceding train in the same direction. By rule 221 when a train is stopped by a train order signal, whether it be for train orders under that rule, or to maintain the interval as required by rule 91, it "must not proceed without a clearance card Form A or a caution card Form C, although train orders may have been received." That this construction is in accordance with the contemplation of the defendant's operating rules is seen by referring to blank Form A clearance card therein, with the explanatory note. Blank spaces are left to be filled in, and concerning them the note says: "The numbers of orders for the train must be filled in in figures. When there are no orders the word 'nil' must be

written in. If the next train ahead has not reached the next telegraph office the words 'not yet' must be written in the blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type. Operators must keep the lowest copy. Where the Automatic Block Signals are in service instead of Station Block the information relative to the train ahead may be omitted." The conductor and engineer must each have a copy. The only exception mentioned in the note, to the requirement of information relative to the train ahead, is when Automatic Block Signals are in use. If intended to exclude such requirements as to freight trains, scheduled or extra, it should seem most natural to indicate such intention in connection with the exception made. We think no such exclusion was contemplated, and we hold that rule 221 was applicable in the circumstances of this case, and that a compliance therewith required the clearance card to train 708 at Bethel, to be filled in to show the next train ahead (No. 401), the time when it left the station at Bethel, and that it had not yet arrived at Randolph. The blank spaces provided in that form of clearance card to be filled in with such information were not filled out at all, a dash being made in each such space instead.

[11.] The witness Wright, conductor of train 708 on the night in question, called as a witness by the plaintiff, having testified in examination in chief that he received an order and clearance card at Bethel; that there was no stop after leaving Bethel, and he had no notice whatever that train 401 was ahead of him; that he did not believe he was going to meet a freight train between Randolph and Braintree; that he was running between 20 and 23 miles an hour; that

he saw no tail lights of 401 at any time before hitting that train, and had no warning or notice of any kind that 401 was ahead of him; and that there was a straight track above Randolph back from the scene of the accident for about half a mile—was asked in cross-examination. "Q. And supposing you were delayed on sidings, and after you got back on the main line, a lot of time is lost, how do you protect your rear end?" It was not error to exclude the question as not cross-examination.

[12.] One Beeman, called by plaintiff, having testified that the intestate had rented a house of him for nearly three years, was asked, "Q. And after renting it, did you, previous to his death, make a contract of sale of the house and property to him?" The witness gave a long answer, some of it responsive to the question and some not. Defendant moved to strike out the answer on the ground that it was not responsive, too involved, and a part of it immaterial. On being asked what part of the answer it desired to have stricken out, the defendant said the whole of it as not responsive to the question. The answer being responsive in part, no error was committed in overruling the motion.

[13.] Against the objection of immateriality, plaintiff was permitted to testify that the intestate was a member of a church, as indicating the moral training and discipline and influence which would have been received from him by his children. We think this was proper evidence to be considered by the jury in determining the pecuniary damages occasioned by his death. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417; Tilley v. Hudson River R. R. Co., 29 N. Y. 252, 86 Am. Dec. 297; McIntyre v. New York Cent. R. R. Co., 37 N. Y. 287; Board of Commissioners v. Legg, 93 Ind. 529, 47 Am. Rep. 390; Opsahl v. Judd, 30 Minn. 128, 14 N. W. 575; Illinois, etc., R. R. Co. v. Weldon, 52 Ill. 290; Baltimore, etc., R. R. Co. v. Wightman's Adm'r, 29 Grat.

(Va.) 431, 26 Am. Rep. 384.

[14, 15.] L. O. Gibbons, the conductor of train 401, was called by the defendant, and testified in direct examination that the intestate was sitting in front of the stove in the main body of the caboose, lighting his pipe, when last seen by the witness after leaving Randolph. The purpose of this testimony was to show that the intestate was acting improperly at the time of the accident. To rebut this inference, the plaintiff asked the witness in cross-examination if he did not state in writing as follows: "We were doing all I thought necessary and proper to do on that occasion; he was in the line of his duty as well as myself, and other men of the train, and it was not the fault on my part or the part of Mr. White (intestate) that caused the collision." Defendant objected on the ground that the writing had not been shown to be signed by the witness. Yet the witness had testified that he signed it. The further question to the witness, "Did you intend to say at that time what I have read to you here?" was objected to on the ground that it was a conclusion. The witness answered, "Yes." The question called for a fact, not a conclusion; consequently the objection made is without force.

[16.] The defendant called one J. E. Maun as a witness, and, having qualified him as an expert on railroad rules, asked him what duty rule 91 imposes upon the rear brakeman; the defendant claiming that it was entitled to the opinion of an expert upon the rules. The question was excluded and exception saved. The construction of this rule, if material, was for the court; and, while experts may be called to define terms of art, to explain the principles of their science, where such principles are necessary to be understood, to state the condition and practice of their business, when material, they cannot, as witnesses, be permitted to instruct the court as to the meaning and legal construction of a written instrument, nor to give their opinion thereon. Corning v. Burden, 15 How.

252, 14 L. Ed. 683; Winans v. New York & Erie R. R. Co., 21 How. 88, 16 L. Ed. 68; McIsaac v. Northampton, etc., Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; Fuller v. Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4; Pratt v. Dunlap, 85 Conn. 180, 82 Atl. 195.

[17.] Defendant called as a witness one Preston, and showed by him that he had been a locomotive engineer for 24 years, that in November and a portion of December, 1911, he ran engine 708 between St. Albans and White River Junction, and that she was an "A No. 1" engine. In cross-examination the witness testified to booking on the 21st day of the latter month, "pack the right valve stem," because that valve stem was leaking, and further testified to booking, "pack under stem joint," because it needed it. Plaintiff's attorney then offered to show that certain repairs were reported necessary on this engine by the witness on the 14th, 18th, and 21st of December. In making the offer the attorney said: "We offer to show this leaking of steam on the 21st of December—on the 18th of December—in other words, these engineers, both of them, have testified that when an engine was out of repair they booked it, and they relied on these books to fix their memory about it, and in cross-examination I have referred to these books because they referred me to them." The question was waived, and an exception was allowed the defendant to the making of the offer, on the ground stated, "It has all gone to the jury from Mr. Austin." It does not appear that the attorney in making the offer acted in bad faith, nor that he said anything improper within the hearing of the jury, and presumptions will not be made in support of the exception.

[18.] Nor was it error to allow, subject to defendant's exception on the ground that the evidence was incompetent and immaterial, the same witness to testify that engine 708 was leaking from the right valve stem on the 21st of December, when he came

in; nor than on the 18th of the same month she was leaking from "that right by-pass head." In neither case was the testimony outside of the scope of proper cross-examination.

[19.] One Kramer was called by the defendant as an expert on rules and on the operation of railway trains on the road. In cross-examination he was asked whether the defendant company operated trains by block signals, and, against the objection of incompetency and immateriality, the witness answered that it did not, as far as he knew. In view of the form of clearance card A and the explanatory note accompanying it in defendant's Book of Rules, already noticed, the evidence objected to cannot well be said to be immaterial, and how it was incompetent has not been pointed out. Evidence of the same fact was introduced by both parties.

[20.] The defendant offered to show by its witness, one Fitzsimons, an expert on engines, and a master mechanic, as follows: "We would like to show that under the federal law those engines all are frequently inspected, and that this (No. 708), among the others, was inspected prior to the time when it was used on this occasion and was found all right." This offer includes, not only engine 708, but engines in no wise connected with this case. As to the latter; the evidence was not admissible, consequently the whole was properly excluded. Vaillancourt v. Grand Trunk Ry. Co., 82 Vt. 416, 74 Atl. 99.

At the close of the evidence defendant moved for a verdict on 10 different grounds, numbered from 1 to 10 consecutively. The different grounds will be referred to and considered by number, but not in their order. Numbers 2 and 9 are based upon the claimed omissions of necessary averments in the declaration to entitle the plaintiff to recover under the federal Employers' Liability Statute. In legal effect these are

disposed of by our holdings on the demurrer and on the grounds considered on the motion in arrest of judgment, and need not be further noticed.

[21.] The grounds of Nos. 4, 5, and 6 are that of contributory negligence by the intestate. Under the federal statute (Act. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), contributory negligence by the servant does not defeat the action. It affects the question of damages only. By section 3, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe, as compared with the combined negligence of himself and the employer. Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096.

[22.] Ground No. 10 is that there is no evidence in the case showing the train upon which the intestate was killed to have been engaged by the defendant in interstate commerce, nor that at the time of the accident the intestate was employed in such commerce. Under the pleadings neither of these facts was in issue. They stood as judicial admissions by both parties, by the defendant in its plea, by the plaintiff in her replication, and thus they were outside the range of evidence either to establish or dispute. Wig. Ev. §§ 1064, 2589; Paige v. Willet, 38 N. Y. 28; Tisdale v. President, etc., D. & H. Co., 116 N. Y. 416, 22 N. E. 700.

[23-25.] Ground No. 1 is because upon all the evidence in the case the plaintiff is not entitled to recover, and No. 3 because the evidence shows the defendant free from fault. The evidence tended to show that previous to the night in question considerable trouble had been had with engine 708 by reason of its frequent leaking of steam beyond that usually expected from engines in proper condition, so much so

that on several occasions within a month before the accident it had been booked for repairs in this respect; that on the night in question it leaked steam very badly about the steam chest and piston rods before leaving White River Junction, so much so that the engineer directed a brakeman to get onto the pilot of the engine to line up the switches, he not being able to see them because of the escaping steam; that after leaving White River Junction the escaping steam was so dense about and over the engine that a person on the seat of the fireman or of the engineer in the cab could not see forward by the engine, and that this condition continued all the way to the place of the accident; that because of such escaping steam when the train left Randolph, and up to the time of the collision, they could not see the tail lights of train 401, though the evidence tended to show they were all lighted, and that the track was straight the last half of a mile or more. Whether the engine's thus leaking steam was consequent upon the defendant's neglect to keep it in suitable repair was a question for the jury. With this question answered in the affirmative, such negligence was a proximate cause of the accident. Again, the evidence tended to show that, owing to the difference in the size of the wheels, engine 708 was faster than engine 401, and so steadily and rapidly gained upon her the night in question that, with the delays of the latter, when train 708 stopped, at Bethel, train 401 had not reached Randolph, 7.1 miles away.

It is said in Louisville, etc., R. Co. v. Heck 151 Ind. 292, 50 N. E. 988, that "a railroad company is legally bound to know, and therefore in law it does know, the whereabouts of all its trains," but in disposing of the case before us it is not necessary to consider this presumption; for respecting the night of the collision the evidence showed that the train dispatcher, through reports required by the rules of the company to be given him promptly by the telegraph operators

at the different stations on defendant's line of the time of arrival and departure of all trains, was informed of the positions of these two trains as they proceeded north from White River Junction to the place of the accident. Having such information, the train dispatcher knew that, when 708 left Bethel, 401 was less than 7.1 miles ahead, and he must have known that as the two trains were proceeding it was inevitable that the rear train would shortly overtake the other, unless steps were seasonably taken to prevent it; and, being vice principal, his knowledge in these respects was the knowledge of the defendant. Therefore it cannot be said as a matter of law that, in the circumstances shown by the evidence considered most strongly in favor of the plaintiff, including the inability of those in charge of the rear train to see ahead because of escaping steam, the defendant so dealt with the problem before it as not to expose the intestate to perils against which he might have been guarded by the exercise of the requisite degree of care on its part. In the absence of any notice by the defendant at Bethel or Randolph to those in charge of train 708 concerning train 401, with such instructions as were reasonably calculated to prevent a collision, a jury might well say that the defendant did not take such care to protect the intestate from accident as the exigencies of the situation required. Sheehan v. New York C. & H. R. R. R. Co., 91 N. Y. 332.

[26.] The seventh and last ground of the motion: "Because the declaration states that the plaintiff's intestate was injured by a cause of injury known to him; that he did not know and comprehend the danger in which he was placed at the time he received his fatal injury, while the evidence does not show that; hence

the plaintiff has fallen short of the allegations in his declaration in a vital and material matter." It is a sufficient answer to this to say that the bill of exceptions states that the plaintiff's evidence tended to show that during the trip the intestate had no notice or warning of any kind whatever that 708 was following; and the evidence, on examination, warrants this statement. The evidence further tended to show that train 401 was running at the time of the collision about 12 miles an hour, and that the speed of 708 was then from 22 to 24 miles an hour, while the average rate of speed for extra freight trains was from 10 to 15 miles an hour. The motion for a verdict was properly overruled.

Defendant made 12 requests to charge. It excepted to the charge as follows: "For the failure of the court to charge as requested in original requests Nos. 1 to 12, inclusive, and for failure to charge as requested in additional requests Nos. 1, 5, 6, 7, and 11, and the exceptions were allowed severally so far as the charge did not comply with said requests, and so far as said requests were material, and stated a correct proposition of law; because the court omitted to say," etc., particularly specifying certain omissions to charge, and parts of the charge given.

These exceptions other than those particularly specified are too general for consideration. Those so specified will be considered in their order.

(1.) "Because the court omitted to say that if the jury found 708 defective, but that that defect was not the proximate cause of the injury, then the defective condition of 708 would be eliminated from the case." This exception cannot be sustained. We have already seen that the defective condition of that engine by way of leaking steam was one of the circumstances to be considered by the jury in determining whether the defendant was guilty of negligence in not notifying train 708 concerning train 401, with such orders as

might reasonably be necessary to prevent a collision. Hence the defective condition of engine 708, though found not to be the proximate cause of the accident, would not, by reason thereof, necessarily be eliminated from the case.

[27.] (2) To what the court said, that "If the jury found that the defendant followed the rules, but there was a better way, then the defendant still might be negligent." This exception points to the latter part of the following paragraph in the charge: "The defendant, as well as the plaintiff, has used as evidence in this case some of the rules of the defendant company tending to show that the defendant was following those rules at the time of the accident, and that those rules were such as were in general use by railroads throughout the country. They have been denominated in the course of the trial as general rules. If you find such to be the fact, that would be evidence tending to show that the defendant was operating the train at the time of the accident in a prudent manner, if you find that he [it] was following those rules and adhering to them, but if the conditions were such on the occasion of this accident that a prudent man ought and would have foreseen the accident might and would happen, if those rules were followed, it would be negligence on the part of the defendant to follow them if there was any reasonable way in which to operate train No. 708 for it to avoid such accident." With the latter part of this portion of the charge the defendant has no reason to complain. It is held in an earlier part of this opinion that rule 221 was applicable to train 708 when it stopped at Bethel, and that by the requirements thereof the clearance card given to that train should have been filled in to show the time when the next train ahead (No. 401) left Bethel, and that it had not yet reached Randolph. By the undisputed evidence the clearance card was not so filled in. Consequently thenceforward the defendant, in operating train 708, was not following the rules and adhering to them.

[28.] (3) "To what the court said when he said it was the plaintiff's duty to determine whether the train was making the speed required, whether the train was liable to be overtaken by another train, upon the ground that the rules are positive about that, and there was no room left for discretion under the circumstances on the part of the plaintiff's intestate." One of the defendant's requests to charge was: "It was the duty of the plaintiff's intestate, under the rules in force at the time of the injury, to have flagged, by means of torpedoes and fusees, train 708 to prevent its colliding with 401 at Randolph, and to have put out fusees at intervals between Randolph and the place of the accident. This he did not do." In charging upon this subject the court told the jury they were to determine what the duty of the intestate was for the protection of train 401, and this duty as claimed by the defendant, was largely to be gathered from its rules; the court proceeding: "Rule 36 provides as follows: 'A red or yellow fusee, as the case may require, will be used for the protection of a train which is not making the speed required by schedule or train order, and is liable to be overtaken by a following train.' We construe that rule to mean that it was the duty of the plaintiff's intestate, as rear brakeman of that train, to put out a fusee when certain conditions existed, and, the rule being a command to him, that it was his duty to determine that question, that is, it was his duty to determine whether train 401 was making the speed required by the train order, as there was no schedule time, and that also he was to determine whether it was liable to be overtaken by a following train. If the train was not making the speed required by the train order, and that train was liable to be overtaken by a following train, and he as a careful and prudent man ought to have known that, then it was his duty to put out fusees between Randolph and the place of the accident, but before he was called upon to do this, these conditions must have existed: That the train was not making the speed required by the train

order, and that he, as a prudent and careful man, knew or ought to have known that the train was liable to be overtaken by a following train." The effect of this charge was to place the responsibility of protecting the rear end of train 401 upon the intestate, if the train was not making the speed required by the order and was liable to be overtaken by a following train. So far the charge was in substantial compliance with defendant's request, and no exception was taken thereto. The further charge in connection therewith that the determination of whether such conditions as to speed of the train and liability of being overtaken by a following train, as by the rule to require such protection, was with the intestate upon what he as a careful and prudent man knew or ought to have known, was but the legal consequence of the preceding part of the charge in accordance with defendant's request, and not excepted to. The care and prudence of a prudent man in like circumstances has so often been laid down as the rule of diligence required that citation of authorities is unnecessary. It necessarily follows that with the latter part of the charge thus given the defendant can have no reasonable ground of complaint.

[29.] (4) "To the construction which the court placed upon rule 99, wherein the court said, 'If a train is stopped and delayed on the main line.'" and "to what the court said about rule 99, because the rule conveys the fact that when a train is stopped on the main line it is an absolute duty, under all circumstances, for the flagman to protect his rear by fusees and torpedoes." Following the taking of these exceptions, the court gave a supplemental charge on the same subject, to which no exception was saved, thus curing the defect, if any there was, in the original charge.

[30.] (5) "To the charge of the court where it said, in substance, that plaintiff's intestate claims that the defendant had no right to run engine 708 in the condition it was, if the jury so found she would be entitled to recover." The part of the charge to which

this refers was: "The plaintiff claims that her intestate did all on that occasion that his duties under the rules and under his employment required, but that because of the negligence of the defendant, as claimed by her, this accident occurred and her intestate lost his life. She claims further that although you [the jury] might find that the defendant was following these rules on the occasion in question, because of the condition of engine No. 708 the defendant had no right to run train No. 708 as it did run it, and that it had no right to follow those rules in view of the condition of engine No. 708 leaking steam as she claims it did. If she has made out those claims by a fair balance of the evidence, and the claims which she makes before you, then she is entitled to recover, although you may find that the intestate was also negligent, and that that negligence contributed to his death."

It is said in defendant's brief that there was no further charge with reference to proximate and remote cause. Considering this part of the charge, as it should be, in connection with what the court had already instructed the jury, it is not subject to the criticism made. The court had previously charged that, in order for the plaintiff to recover, not only must she establish that the defendant was negligent, but she must also establish that that negligence proximately contributed to the death of her intestate, or was the proximate cause of it; that the burden was upon her to make out a cause of action against the defendant; that "she claims that the defendant was negligent in the operation of train drawn by engine No. 708," etc.; that it was the duty which the defendant owed to the intestate and all the other employes on train 401 to operate train 708 in a careful and prudent manner, as it would have been managed by a careful and prudent man, so as not to do injury to its servants on train 401; that it was not

enough to prove that the accident happened, but the question for the jury to determine was whether the defendant was negligent, and whether that negligence proximately contributed to the death of the intestate, or was the proximate cause of it. Then follows: "The plaintiff claims that the negligence of the defendant, which caused the death of her intestate, was the running of train No. 708 with its defective engine; that it never should have run that train from the station at White River Junction; that it was negligent in that it did not give such warning to train No. 708 and train 401 as it ought to have given in the circumstances of the case, in consideration of the condition of engine No. 708; that engine No. 708 was not in proper condition, and was not suitably and properly equipped, and to recover in this suit, she must make out this negligence which she claims." In giving the part of the charge complained of, it was not necessary for the court to repeat in detail all the elements it had before stated as necessary for the plaintiff to establish in order to entitle her to recover, and particularly so since the negligence claimed by the plaintiff regarding the defective condition of engine 708, and the running of her in such defective condition was alluded to by the court in connection therewith. There is not the slightest ground for doubt that the court intended that the portion of the charge of which complaint is here made should be considered in connection with that which had gone before, as above indicated, nor is there any doubt that the jury so understood it. The exception is not sustained.

[31.] (6) "To the failure of the court to charge about the contingencies of illness and loss or impairment during the period of life, and also the contin-

gency of death prior to the time limit of expectation." Evidence was introduced showing the intestate's age at death, his previous condition of health, his habits, earning capacity, etc., together with the expectancy of life of a man of his age, according to the American Experience Table of Mortality. On the question of damages the court charged, among other things, as follows: "In determining what he [intestate] is worth to the family, you should consider his actual earning power, and you should take into consideration his power to earn for the length of time that he may be expected to live, etc. Thus under the charge the jury were to consider the intestate's earning power during the term of life expectancy, which consideration involved the probabilities as to his health and physical condition. We think the charge was sufficiently explicit in this respect. See Baltimore, etc., R. R. Co. v. Wightman's Adm'r., before cited.

[32, 33.] (7) "To the charge that the burden was on the defendant to show that the intestate was negligent in not depositing torpedoes and fusees in rear of his train." The portion of the charge here challenged was in effect that on the question of the intestate's contributory negligence the burden of proof is with the defendant. It is said by defendant that under our holdings it devolved upon the plaintiff to show the intestate free from fault. There can be no question but that the rule in this state, in actions for negligence based upon state law, is as stated by the defendant. This case, however, is brought upon an act of Congress regulating the liability of employers engaged in interstate or foreign commerce for injuries received by their employes while engaged in such commerce, and it supersedes the laws of the state in so far as the latter cover the same field. Mondou v. New York, N. H. & H. R. Co., cited above. Consequently the question of the burden of proof respecting contributory negligence on the part of the injured employe is to be determined according to the provisions of that

act, and the declaration of the Supreme Court of the United States thereon controls. In Seaboard Air Line Ry. v. Moore, 113 C. C. A. 668, 193 Fed. 1022, this burden was charged to be with the defendant, and on writ of error the judgment was affirmed by the Supreme Court of the United States. Same case, 228 U. S. 433, 33 Sup. Ct. 580, 57 L. Ed. 907.

[34.] As another assignment in its motion in arrest why the judgment should be arrested, the defendant says that some of the counts of the declaration are defective in not alleging lack of knowledge by the intestate of the various grounds of negligence and items of carelessness on the part of the defendant alleged as constituting the cause of action; the verdict of the jury being general. Assuming some of the counts to be thus defective, it is not a ground for arresting the judgment. The statute expressly provides that if a declaration contains defective counts and also good counts for the same cause of action, the verdict shall be deemed the finding of the jury on the good counts, unless it otherwise appears; and judgment shall be given according to the right of the cause and the matters in law, without regard to the imperfections or defects in other counts. P. S. 1505; Varnum v. Highgate, 65 Vt. 416, 26 Atl. 628.

This in effect disposes of all questions within the exceptions and stated as points to be discussed in defendant's brief.

Judgment affirmed.

EXTRACTS FROM TESTIMONY.

C. E. PRESTON, called by defendant, sworn:

Direct Examination by Mr. Amey:

Q. Have you ever run engine 708? A. Yes sir.

Q. When did you run engine 708?

A. I run her in November and a portion of December, 1911.

Cross-examination by Mr. Austin:

Q. Did you run that engine on the 21st day of December?

A. I should say I did.

(Exhibits Z-5, 6, 7 and 8, being pages of the defendant's engine repair book, were submitted to the witness.)

Q. Well now, having looked at the book, Charlie, will you tell us whether the engine was in fact and truth leaking from the right valve stem on the 21st of December, when you came in?

A. It certainly was, or I shouldn't have booked it.

Q. And on the 18th of December was she leaking from that front by-pass head?

A. I don't think that was opposite my signature, was it?

Q. Yes. A. Yes sir.

Q. She was?

A. She must have been or I shouldn't have booked it.

D. A. McDONALD, called by defendant, sworn:

Direct Examination by Mr. Amey:

Q. Were you the engineer on 708 the night that Enoch L. White was killed? A. Yes sir.

Q. And was that in January, 1912? A. Yes sir.

Q. And when you report an engine for repairs you write it down in a book, do you? A. Yes sir.

Q. And sign your name? A. Yes sir.

Cross-Examination by Mr. Austin:

Q. I show you work book pages marked "Z-1" to "Z-4," and ask you to look that over and then tell us if that refreshes your recollection. What do you say, does it refresh your recollection?

A. That is my writing.

Q. Now on the 5th of January, 1912 did you report the right valve stem leaking? A. Yes sir.

Q. And was she leaking elsewhere?

A. I booked her stay-bolts to be calked.

Q. What does "Put gasket in front over-pass," indicate?

A. That was a leak.

Q. Now on January 7, 1912, was this engine also leaking at the right valve stem?

A. Yes, it was booked to be packed on that day.

Q. And was she leaking in the over-pass?

A. Yes sir.

Q. Now on January 10, was she leaking at the right valve stem? A. Yes sir.

Q. And now on the morning after the accident did you report her "To pack all valves in cab?"

A. Yes sir.

Q. Did you report her to "Turn right valve stem so it will not leak?" A. Yes sir.

Q. "To pack the left piston?" A. Yes sir.

Q. And to "Put a gasket in right injector?"

A. Yes sir.

Q. That is the water connection, isn't it?

A. Steam connection.

Q. So that every run you made with that engine previous to this accident, from the 5th day of January, she was leaking at those places, was she?

A. She was leaking at the places booked on the book.

LOUIS H. RUSSELL, called by plaintiff, sworn.

Direct Examination by Mr. Austin:

Q. On the 11th day of January, at White River Junction, Vermont, what were you doing, what train were you brakeman on? A. On extra 708.

Q. Now at White River Junction what was the condition of this engine with reference to steam?

A. Well she was leaking steam very bad.

Q. How badly?

A. Impossible to see by her.

Q. Impossible to see by her? A. Yes.

Q. And what did you do there at White River Junction with reference to the switches, tell us what happened at White River Junction.

A. Well, the engineer informed me to get onto the pilot of the locomotive so to line up the switches because he couldn't see them.

Q. I am not asking for anything he told you, you know; I am asking for the appearance that you saw

yourself. Did you see yourself why he couldn't see them?

A. Yes sir.

Q. Why was it then?

A. Escaping steam.

Cross-Examination by Mr. Amey:

Q. Could you see things from the pilot, that you couldn't see from the cab? A. Yes sir.

Q. Why was that?

A. Because there was no escaping steam ahead of me, from the pilot.

Direct-Examination by Mr. Austin:

Q. Then where did you go? A. Into the locomotive.

Q. What position did you occupy in the locomotive?

A. Fireman's seat.

Q. Now what did you observe about steam there in that engine, in the cab of that engine?

A. That was pretty dense from the broken joints and stay-bolts in the cab.

Q. Was steam leaking from the fittings in the cab?

A. Yes.

Q. Could you see the engineer across the cab?

A. Well hardly.

Q. And why? A. The steam.

Q. Now as you sat there on the fireman's seat

did you look forward, look ahead?

A. Yes sir.

Q. Could you see by the engine? A. No sir.

Q. Why? A. For steam.

Q. Did that condition continue all the way from White River Junction to the accident? A. It did.

Q. Now when you went out of Randolph that night, and up to the time you hit the rear end of 401 were you able at any time to see the tail lights of 401?

A. No sir.

Q. Why not? A. For steam.

L. O. GIBBONS, called by plaintiff, sworn.

Direct Examination by Mr. Austin:

Q. Now of what train were you conductor on the 11th day of January, 1912?

A. Of an extra freight train 401.

Q. Well, now, what was on the rear end of your train, did you have markers on? A. Yes.

Q. Describe what those are.

A. There are two, as we call them, tail lights, two red lights to the rear, and green lights to the side, and both sides and to the front.

Q. And was there any other light out there?

A. There was a red lantern.

Q. Were they all lighted? A. Yes.

Q. What kind of a night was this? A. A clear, cold night.

Q. And about how far was it from the place of

the accident, how far back from the place of the accident can you see?

A. About a half a mile.

F. J. STORMS, called by plaintiff, sworn:

Direct Examination by Mr. Austin:

Q. So that on January 11th and 12th you were train despatcher for this Company, 1912? A. Yes sir.

Q. I suppose that all operators on the main line of the Central Vermont Railway Company are under your supervision and direction as train despatcher, are they? A. Yes sir.

Q. And the movement of all trains is under your supervision?

A. Yes sir.

Q. Did you know then that 401 was a low wheel compound engine?

A. Yes sir.

Q. And that 708 was a high wheel compound engine? A. Yes sir.

Q. And did you know that 708 was the engine used for hauling the fast 92 Chicago freight? A. It had been for quite a few trips.

Q. And that 401 was a slower engine? A. Yes sir.

Q. And these two trains here, 401 and 708, were you then on the 11th and 12th of January, acquainted with the positions of those two trains as they pro-

ceeded north from White River Junction to the scene of the accident?

A. I were as fast as I got the reports from the different offices *****.

Q. Well then do you mean to have us understand that unless the operator at a station is taking an order, and the line is engaged for that purpose, that it is his duty to report immediately the arrival of a train at a station?

A. Yes sir, unless the dispatcher is busy with some other offices sending or receiving orders; of course, in that case he would wait until I got through.

Q. And if the line is so busy then, as soon as it is relieved of that business, what must you do?

A. Supposed to report.

Q. And is that true also of the departure of a train from a station? A. Yes sir.

Cross-Examination by Mr. Amey:

Q. Mr. Storms, I wish you would take those sheets and refreshing your recollection from them, tell me what time that 401 left White River Junction that night.

A. The train sheet shows that they left there at six o'clock P. M.

Q. And what was the first stop?

A. Well all that is shown on the sheet is South Royalton at 9.20.

Q. What time did they leave there?

A. Left there at eleven o'clock.

Q. When is the next stop, where was the next stop?

A. Bethel.

Q. When did it arrive there? A. 11.52.

Q. When did they leave there? A. 12.15 A. M.

Q. Where was the next stop, Mr. Storms?

A. Randolph.

Q. When did it arrive there? A. 12.50.

Q. When did it leave there? A. 12.54.

Q. Take 708 and tell me when that left White River Junction that night. A. 10.12.

Q. What was its first stop? A. West Hartford.

Q. When did it arrive there? A. I can't say as to that, for the office was closed.

Q. And where is the first office at which you have a record?

A. South Royalton.

Q. What time did 708 arrive at South Royalton?

A. It passed there at 12.08 A. M.

Q. Did not stop? A. No sir.

Q. And where was the first stop of 708 that night?

A. At Bethel.

Q. This would be the morning of the 12th, wouldn't it?

A. Yes sir.

Q. What time did 708 arrive there? A. 12.30.

Q. What time did it leave there? A. 12.36.

Q. What time did 708 pass Randolph that morning?

A. At one o'clock.

These train sheets marked "Plaintiff's Ex. H," and "I" showed that the mileage from White River Junction to Randolph was 32.4 miles, and from Bethel to

Randolph was 7.1 miles.

WILLIAM L. WRIGHT, called by plaintiff, sworn:

Direct Examination by Mr. Austin:

Q. In January, 1912, were you employed by the defendant Company?

A. Yes sir.

Q. As what? A. Conductor.

Q. What train were you conductor on? A. Extra 708.

Q. And at Bethel did you receive an order? A. Yes sir.

Q. Is this plaintiff's Exhibit "G" the order? A. Yes sir.

Q. Now did you receive a clearance card at Bethel accompanying this order? A. I did.

Q. I show you Plaintiff's "R", do you recognize that?

A. I should think that was a copy of it, yes sir.

Plaintiff's "R" offered and received.

Note: For copy see Decision Appendix p. 54.

Q. Now did you have any notice whatever that train 401 was ahead of you? A. No sir.

Q. Did you have any reason to believe that you were going to find a freight train on the track between Randolph and Braintree?

A. Did not.

Q. What rate of speed were you running?

A. Why I should judge between twenty and twenty-three miles an hour.

Witness Russell, Supra:

Q. About what rate of speed were you going when you struck this train?

A. Oh twenty-two to twenty-four miles an hour.

Witness Storms, Supra:

Q. Mr. Storms, did you send any order to 708 regarding 401 on the night of the 11th, or morning of the 12th of January?

A. No sir.

Q. Did you send any order to 401 on that occasion with reference to 708? A. No sir.

Witness Gibbons, Supra:

Q. Did you as conductor of 401 have any order at all from the train dispatcher of this defendant on 708? A. No.

Q. Did this operator at Randolph give you any information of the position of train 708 when you arrived at Randolph?

A. No.

Q. Now did Enoch L. White, the plaintiff's intestate, see that order so far as you know, down there at South Royalton, that you saw, addressed to 403 to meet 708 somewhere? So far as you know. I will ask only for your knowledge.

A. Not as I know of.

Q. Did you tell him anything about that order?

A. I don't remember.

Q. And you started from a standstill at Randolph?

A. Yes.

Q. Now what rate of speed had you attained when the accident happened?

A. I judge we were making about twelve miles an hour.

WRIGHT, Supra:

Q. Now what is the average rate of speed for an extra freight train?

A. The average rate is from ten to fifteen miles an hour.

Supreme Court of the United States.

October Term, 1914.

No. 407.

Central Vermont Railway Company, Plaintiff in Error,

v.

Mary Theresa White, Administratrix of the estate of Enoch L. White.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

In the words of the Supreme Court of Vermont, disposing of the case below, (Record, 321-322), "This is an action on the case, claimed by the plaintiff to be under the Federal Employers' Liability Statute, but by the defendant to be under the State law, to recover for personal injuries resulting in the death of the plaintiff's intestate, Enoch L. White, on the 12th day of January, 1912. The declaration contains several counts, but in the respects essential to be noticed in disposing of this question, the allegations of all the counts are substantially alike, and may be stated with sufficient definiteness for this purpose as follows: that prior to and on the day named above, the defendant corporation was the owner and operator of a certain railroad, extending from St. Johns in the Province of Quebec in the Dominion of Canada, to and through the City of St. Albans, in the State of Vermont, and through the towns of Braintree, Randolph, and Bethel to White River Junction in said State, and in connection with other lines of railroad to and through other states, was then and there engaged in commerce between several states, and between the State of Vermont and the Dominion of Canada, as a common carrier; that

on the day aforesaid the intestate was engaged in the defendant's employ on its railroad as a freight brakeman, and that while thus engaged, at a certain point between the stations of Randolp and Braintree, solely by reason of the carelessness and negligence of the defendant, its agents, servants, and employees, a collision between two of the defendant's freight trains occurred, and the said intestate by means thereof and solely by reason of the negligence of the defendant, its agents, servants, and employees, and without fault or contributory negligence on his part, while in the performance of his duty as brakeman on one of said trains, was instantly killed. The allegations further show that the intestate left surviving him a widow, then pregnant, and minor children including the one yet unborn but subsequently born alive, and that this suit is brought by the personal representative of the intestate for the benefit of said widow 'and next of kin minor children, under and by virtue of the statute and laws in such case made and provided.'

None of the counts contain averments showing that the train on which the intestate was engaged at the time of his injury, was being operated in interstate or foreign commerce, nor that he was then employed by the defendant in such commerce, without which character of his employment there could be no right of action under the Federal Employers' Liability Act. Mondou vs. New York, New Haven and Hartford Ry. Co., 223 U. S. 1, 56 L. ed. 327; Pedersen vs. Delaware, Lakawanna & Western Ry. Co., 229 U. S. 146, 57 L. ed. 1125. The defendant pleaded in bar, expressly alleging, among other things, that at the time of the happening of the several things in the plaintiff's declaration mentioned, the defendant was and ever since has been a common carrier by railroad engaged in commerce between the State of Vermont and the State of Massachusetts and State of Connecticut, and between the State of Vermont and the Dominion of Canada, and that at the time the plaintiff's intestate received the injuries complained of in the declaration, he, the intestate, was employed by the defendant, common carrier as aforesaid, in such commerce. The plaintiff replied *precludi non*, because, etc., iterating the said allegations in the defendant's plea, and averring that by the laws and statutes of the United States and of the State of Vermont, the court has full and complete jurisdiction of the matters and things set forth in the plaintiff's declaration to determine according to law,—concluding to the country.

Defendant demurred to the replication, because (1) it is no answer to the defendant's plea; (2) it is a complete departure from the writ; (3) it introduced a new cause of

action not contemplated in the declaration; (4) it does not support or fortify the declaration; (5) it does not present matter of estoppel to defendant's plea; (6) it does not traverse the plea; (7) it does not confess and avoid the plea; and (8) the declaration purports to recover damages under the laws of the State of Vermont, while the replication confesses that the action should be under the Federal Employers' Liability law.

On hearing, the demurrer was overruled and exception saved. Thereupon a jury was empanelled, and a trial had, resulting in a verdict for the plaintiff,and judgment was rendered thereon."

The bill of exceptions states, (Record, pp. 31, 32), "The plaintiff's evidence further tended to show that its main line consisted of but a single track, and that on the 11th day of January, 1912, at 6:12 p. m., it sent out from its station at White River Junction, destined to Roxbury, Extra 401, consisting of engine 401, a low-wheeled engine with a train of eighteen loaded freight cars, and 16 empty freight cars; that said train 401 proceeded under an order to meet extra 336 and 415 at West Hartford, and having met said trains proceeded northerly under an order to meet extra 403 and No. 10 at South Royalton; that said 401, in obedience to said order, waited at South Royalton from 9.20 to 11 p. m., and then proceeded northerly from South Royalton to Bethel, a distance of seven miles, where it stopped to take water at 11.52 p. m.; that it left Bethel at 12.15 a. m. and proceeded to Randolph, arriving there at 12.50 a. m., where it was stopped to receive orders; that it left Randolph at 12.54 a. m., and arrived at the scene of the accident at 1.05 a. m.; that during this journey the plaintiff's intestate had no notice, or warning of any kind whatever, that 708 was following.

The plaintiff's evidence further tended to show, that the defendant on the 11th day of January aforesaid, started extra 708 out of its station at White River Junction destined to Roxbury, over said single track occupied by extra 401, at 10:12 p. m.; that said extra 708 consisted of engine 708 of a faster type of engine than 401 and with a train of twelve loaded freight cars and 22 empty freight cars; that said extra 708 proceeded northerly to West Hartford, where it met extra 403 and No. 10, and thence continued to South Royalton, arriving there at 12.08 a. m., and leaving at 12.08 a. m., and without stopping continued to Bethel, arriving there at 12.30 a. m.; that at Bethel 708 received an order and clearance card, Form A, and then left Bethel at 12.36 a. m., and passed Randolph at one o'clock a. m., without stopping, and arrived at the scene of

the accident at 1.05, that during this trip, extra 708 had no knowledge and received no notice and no warning of 401 on the track ahead of them; that the clearance card, Form A, received by the conductor and engineer of 708, at Bethel, contained a blank space in which to insert the information that the next train ahead was extra 401; that it left Bethel at 12:15 a. m., and its arrival at a station northerly, and time of arrival thereat, which clearance card contained the direction shown therein, and said card is referred to and made a part of these exceptions.

The plaintiff's evidence further tended to show that automatic block signals were not in service on the defendant's road, and that station block was in service; that said blank spaces provided in said clearance card were not filled out, and a dash was made in the spaces so required to be filled out; that the arrival and departure of these two trains was communicated by telegraph or telephone to the train despatcher of the defendant at St. Albans, and the defendant knew that extra 401 had left Bethel at 12.15 when extra 708 arrived at Bethel at 12.30; that 708 had been overtaking 401 so rapidly that it had made practically four hours difference in their leaving time at White River Junction; that the defendant knew, or ought to have known, that extra 401 was between Bethel and Randolph when extra 708 was permitted to leave Bethel, and that at the rate of speed the two trains had travelled from White River Junction, that 708 was bound to overtake 401 very quickly, and unless 708 was stopped at Randolph; that the defendant knew, or ought to have known, that the station block of five minutes was not adequate protection for these two trains in the circumstances, and that the defendant provided no rules requiring the giving of orders to these two trains respecting their relative positions other than the clearance card, Form A, which was not filled out. That no orders were issued by the defendant to these two trains respecting each other."

ARGUMENT.

1. THE SUPREME COURT OF VERMONT ERRED IN HOLDING THAT, UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, THE BURDEN IN RESPECT OF CONTRIBUTORY NEGLIGENCE WAS ON PLAINTIFF IN ERROR.

The court charged the jury: (1) "In other words, the defendant's claim is that the plaintiff's intestate neglected his duty and in consequence of his neglect, and solely in consequence of that, this injury happened, and the plaintiff's

intestate lost his life. If the defendant has made that fact out, as it claims, that the accident occurred solely through the negligence of the plaintiff's intestate, then the plaintiff in this case cannot recover, and your verdict should be for the defendant. But this point is a claim made by the defendant, *and it is incumbent upon him to establish that fact by a fair balance of all the evidence in the case*, that is, you must be more inclined to believe that the plaintiff's intestate neglected his duty than otherwise in order to find that fact." (Record, pp. 302-303); (2) "The defendant claims that train 401 did stop and was delayed on the main track at Randolph, under circumstances in which it might be overtaken by another train, and that it then and there became the duty of the plaintiff's intestate to deposit torpedeos in the rear of train 401, and to set up or deposit fusees. If you find that train 401 was stopped and delayed upon the main line at Randolph, under such circumstances in which it might be overtaken by another train, and if the plaintiff's intestate, as a prudent and reasonable man, understood and apprehended and ought to have understood and known that it was liable to be overtaken by another train, then it was his duty to dismount from train 401, go back a distance as required by the rule, deposit the torpedoes and fusees, as stated in the rule I have read to you, and that is a question of fact for you to determine. The defendant claims that he did not do it, and the plaintiff claims that he did. *It is not for the plaintiff to prove that her intestate did this, but it is incumbent upon the defendant to prove, as we have told you by a fair balance of evidence, that the plaintiff's intestate neglected to do it.*" (Record, 304).

Defendant excepted, "To the charge of the court that the burden was upon the defendant to show that the plaintiff's intestate was negligent in not depositing torpedoes and fusees in the rear of his train." Record, pp. 52, 71-72. See also Record, pp. 315-316.

One assignment of error is: "The defendant's exception taken to the charge of the Court is as follows: (7), 'To the charge that the burden was on the defendant to show that the intestate was negligent in not depositing torpedoes and fusees in rear of his train.'

The decision of the Supreme Court of Vermont was as follows:

'The portion of the charge here challenged was in effect that on the question of the intestate's contributory negligence the burden of proof is with the defendant. It is said by defendant that under our holdings it devolved upon the plaintiff to show the intestate free from fault. 'There can be no question but that the rule in this State in actions for

negligence based upon State law is as stated by defendant. This case, however, is brought upon an Act of Congress regulating the liability of employers engaged in interstate or foreign commerce for injuries received by their employees while engaged in such commerce, and it supersedes the laws of the State in so far as the latter cover the same field. Consequently the question of the burden of proof respecting contributory negligence on the part of the injured employees *is to be determined according to the provisions of that Act*, and the declaration of the Supreme Court of the United States thereon controls.' The Supreme Court of Vermont erred in rendering the decision last above quoted."

From the foregoing it is manifest that: (1) The indicated question is properly before this Court for decision.

(2) That by the *lex fori* the plaintiff below, defendant in error, had the burden of showing her intestate free from contributory negligence; and see

Shumm's Admrx. vs. Rutland R. Co., 81 *Vt.* 186.

(3) That the court below interpreted the Federal Employers' Liability Act as providing that the burden of proof in respect of contributory negligence is on defendant below, —plaintiff in error, for that court said: "Consequently the question of the burden of proof respecting contributory negligence *is to be determined according to the provisions of that Act.*"

This was a misconstruction of the substantive law here involved, the Federal Employers' Liability Act, which resulted in depriving plaintiff in error of the right to have the case reversed and a new trial granted, because of error of the trial court. In this respect that Act only provides that, "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," provided that the employee shall not be deemed guilty of contributory negligence, where defendant's violation of "any statute enacted for the safety of employees contributed to the injury or death of such employee."

It is elementary that, while the substantive rights of the parties are governed by the *lex loci*, in this case by the Federal Employers' Liability Act, the law of the forum governs as to the form of the remedy and all matters of procedure relating thereto; that the doctrine of the burden of proof is part of the law of evidence, of the law of procedure, and is governed by the *lex fori*. In the words of 2

Wharton on Conflict of Laws (3rd Ed.) §478b, at p. 1107, "The burden of proof and the quantum of evidence requisite to recovery are subject to the law of the forum." And again in §574, at p. 1290 of the same work, it is said: "The *lex fori* must determine all questions of evidence, including that of the burden of proof." Hence it was that, before the enactment of the Federal Employers' Liability Act, in all cases of concurrent jurisdiction of the Federal and the state courts, if a servant's action for injuries, received in a jurisdiction where the burden to show freedom from contributory negligence was on plaintiff, was brought in the Federal courts, because of the *lex fori*, the burden was on defendant to show contributory negligence, and no burden on plaintiff at all in respect of contributory negligence, although the law governing the substantive rights of the parties was that of the state wherein the injury occurred, and the law of procedure in that state cast upon plaintiff the burden of showing freedom from contributory negligence.

In 1 Wig. Ev. §6, at p. 19, it is said: "(2) In the State courts, the legislation of each jurisdiction is supreme, except so far as limited by the Federal Constitution. Consequently, the rules of evidence in the state courts *are not controlled in any manner by the Federal statutory legislation*, although they are subject to such limitations as may be prescribed in any Federal constitutional provision (post, §7) applicable to state legislation. The only rule concerning which any question has been raised seems to be the Federal statutory rule (prevailing at different periods) excluding documents not bearing a revenue stamp; but the state courts have here refused, with practical unanimity, to recognize any binding effect in the Federal law."

But the rule here held to be controlling on the Supreme Court of Vermont is neither any part of the Federal Employers' Liability Act, nor any other federal statute, but is a mere rule of procedure adopted by the federal courts. If it were a rule prescribed by the federal statute, it would nevertheless be a mere rule of procedure which, according to the above from Wigmore, would not be binding on the state court. But we are not confronted with that question.

The general rule of the common law, sustained by numerous authorities, is thus stated by Story on Conflict of laws (8th Ed.) at p. 775.

"That, in regard to the merits and rights involved in actions, the law of the place where they originated is to govern; but the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile

of the parties, the origin of the right, or the country of the act."

To the same effect is Northern Pacific Ry. Co. vs. Babcock, 154 U. S. 190, approving Herrick vs. Minn. & St. L. T. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, and cases there cited.

Mondou vs. New York, N. H. & H. Ry. Co. 223 U. S. 1, cited by the Supreme Court of Vermont as compelling the holding here challenged, in no way refers to that question, but merely holds that the Federal Employers' Liability Act is exclusive to the extent of its application; but there is no pretence in that opinion that that Act attempts to prescribe the procedure of the state courts, nor to regulate the burden of proof. Indeed, this Court on pages 56-57 of that opinion says:

"Because of some general observations in the opinion of the Supreme Court of errors, and to the end that the remaining ground of decision advanced herein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, *or to control or affect their modes of procedure*, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, *and is invoked in conformity with those laws*, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication *according to the prevailing rules of procedure.*"

2. IT WAS ERROR NOT TO GRANT THE MOTION OF PLAINTIFF IN ERROR IN ARREST OF JUDGMENT, BECAUSE THE VERDICT WAS FOR A GROSS SUM WITHOUT ANY APPORTIONMENT BY THE JURY, OR BY THE COURT.

It appears that the verdict was for a gross sum, without apportionment. Record, p. 27.

The exceptions state that intestate "left surviving him a widow, Mary Theresa White, the plaintiff, a son Enoch L. M. White, about eight years old, a daughter, Mary A. White, about four years old, and an unborn daughter, all of whom at the trial of said cause were living, and said last mentioned child had become one year and four months old, and was named Elsie T. White," Record, p. 31.

The exceptions state that, "After verdict and before judgment the defendant moved in arrest of judgment, and such motions were overruled and judgment on the verdict rendered, to which ruling and judgment the defendant was

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allowed an exception." Record, p. 53. Also that defendant, plaintiff in error, as one of such motions in arrest, made "A motion in arrest of judgment, because the rule of damages in the declaration purports to be governed by the laws of the State of Vermont and the substance of the Vermont Statute law now existing upon the subject of the recovery of damages. The declaration purports to be under the Federal Employers' Liability Law. *One law for substantive recovery and another law for the distribution of damages* cannot stand together in the same declaration.

By the Federal law the grandchildren of the deceased would receive nothing if the deceased's parents were living. By the law of Vermont, the grandchildren would take it all to the exclusion of parents. By the Federal law in case there is no widow, husband, children or parents, the distribution would be to such of the next of kin as were dependent. By the Vermont law the next of kin would receive portions as provided for the distribution of personal estate without regard to their dependency upon the deceased." Record, pp. 28-29.

Also, "Motion in arrest of judgment because the verdict of the jury in this case was *a general verdict*." Record, p. 29.

The eighth assignment of error is: "(8) The Supreme Court of Vermont erred in holding and deciding that a verdict of $7,168 in one single undivided sum is a valid verdict under the Federal Employers' Liability Law in favor of Mary Theresa White, Elsie White, Enoch L. White and Mary A. White, without stating specifically the amount to be received by each." Record, p. 55.

The 16th, 17th, and 18th assignments of error are: "16. The Supreme Court of Vermont erred in holding and deciding that giving a verdict of the jury under the state statute in a total sum without division was a lawful verdict when the case was tried under the Federal Employers' Liability Act of Congress and there were four beneficiaries set up in the declaration; the widow and four children; and under the Federal Employers' Liability Law the verdict would have to be apportioned by the jury among them.

17. The Supreme Court of Vermont erred in holding and deciding that recovery could be had under a declaration that did not set forth any dependency on the part of the beneficiaries mentioned, and in holding that a refusal by the trial court to instruct the jury that a recovery in one single gross sum could not be had, was not contrary to the meaning and terms of the Employers' Liability Act of Congress of the United States.

ts rendition. C. H. Eddy & Co. v. Field, 85 Vt. 188; Farrant v. Bates, 60 Vt. 37; Morrisette v. C. P. Ry. Co., 74 Vt. 232.

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18. The Supreme Court of Vermont erred in holding and deciding that on motion by defendant in arrest of judgment after verdict of the jury of a sum of money for the plaintiff in solido, that judgment should not be arrested because the verdict was rendered under the state statutes of Vermont and the law governing the case was the Federal Employers' Liability Law of the United States, which requires a division of damages to each dependent relative according to the degree of dependency." Record, pp. 57-58.

It appears that the Supreme Court of Vermont affirmed the judgment of the trial court,—"Judgment affirmed." Record, p. 336.

So it is submitted that from the foregoing it sufficiently appears that the question of whether the jury should have apportioned the verdict was properly raised below, and is clearly and formally presented for the consideration of this Court.

As was said by this Court in Chapman vs. Goodnow, 123 U. S. 540, at p. 549:

"If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chicago L. Ins. Co. vs. Needles, 113 *U. S.* 574.
Bell's Gap R. R. Co. vs. Pennsylvania, 134 *U. S.* 232.
Chicago, B. & Q. R. Co. vs. Chicago, 166 *U. S.* 226.
St. Louis Consol. Coal Co. vs. Illinois, 185 *U. S.* 203.

This Court has just held that the jury must apportion to each beneficiary the amount of his or her recovery. Gulf Col. & S. F. R. Co. vs. McGinnis, 228 U. S. 173, wherein, at p. 176, it is said:

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her *individual pecuniary loss. The apportionment is for the jury to return.* This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

It is no answer to our contention in respect of this assignment of error to say, as is said, that here all of the beneficiaries were dependent on the decedent. They are not all equally dependent, that is manifest. As it is, the amount

recovered must be apportioned between the widow and her children in the "same proportion as in the distribution of the personal estate of persons dying intestate," Public Statutes of Vermont, §2840, if the matter is to be controlled, as it is not, by the Vermont law; and that proportion is one-third, or not less than one-third, to the widow, and the remainder equally among the children. Public Statutes of Vermont, §§2804, 2936. And, if the distribution is not to be controlled by the law of Vermont, as manifestly it is not, the Federal statute has been wholly outwitted and ignored, for there is no provision for the apportionment of this recovery. The courts of Vermont cannot call the defendant in error to account therefor under the Vermont law, for the apportionment is not governed thereby; nor can the courts of Vermont, nor the Federal courts, insist on a distribution or apportionment under the Federal law, for by that law only the jury that tried the case can make the apportionment.

It is plain, as is said in the above quotation from the federal case last cited, that "the interest of each beneficiary must be measured by his or her individual pecuniary loss." Take this very case. The jury might well find, indeed it is manifest, that the widow's pecuniary loss was very much less than that of her unborn babe, and that the latter's was more than that of the eight-year old child.

3. THERE WAS THE ERROR RECITED IN THE 27TH ASSIGNMENT OF ERROR WHICH IS:

"27. The Supreme Court of Vermont erred in holding and deciding as follows: The defendant offered to show by its witness, one Fitzsimmons, an expert on engines and a master mechanic as follows: 'We would like to show that under the Federal law those engines all are frequently inspected and that this (No. 708) among others was inspected prior to the time when it was used on this occasion and was found all right.' This offer includes not only 708, but engines in no wise connected with this case. As to the latter, the evidence was not admissible, consequently the whole was properly excluded." Record, p. 60. That the Supreme Court of Vermont is correctly quoted in above, see Record, pp. 329-330.

The exceptions state that: "During the direct examination of J. E. Fitzsimmons, an expert on engines, and a master mechanic, called by the defendant, he was asked relating to 708 as follows:

Q. Can you tell the jury whether she (708) was inspected by government officials?

A. Well, I cannot say if she was, positively, but if anything had been wrong——

Q. Do not tell what you do not know, Mr. Fitzsimmons, but I want you to tell the jury the necessity of Government inspection for your engines.

The plaintiff objected to this question and the witness was not allowed to answer. The offer is as follows:

'We would like to show that under the Federal law those engines all are frequently inspected and that this, among the others, was inspected prior to the time when it was used on this occasion and was found all right.'

An exception was allowed the defendant.

Prior to this time the witness had stated that this particular engine was subject to inspection." Record, pp. 49-50.

We submit that this holding is erroneous. If it is true, as a general rule, that a federal question cannot be raised on a ruling of the trial court excluding evidence, that doctrine must have some limit; for the exclusion may be of evidence of such a quality, and the exclusion so grossly and manifestly wrong, and work such great and manifest injustice to the party offering it, as to be a deprivation of due process of law, as, it is submitted, was the case in this instance. The excluded evidence was manifestly vitally material to the defence of the plaintiff in error. That seems to be admitted by the Supreme Court of Vermont, but it justifies the exclusion on the arbitrary and baseless ground that the offer was too large. The offer to show that "under the federal law those engines all were frequently inspected, and this among others," was but an offer to show the *res* relied upon. The inspection of the engine in question could not have the evidentiary value to which it was entitled without showing the rest of the offer. You might as well talk about a stick with one end, as talk about the federal inspection relied on without referring to the other engines, for that inspection was part of the warp and woof of the whole transaction, and was so inseparably connected therewith as to make one *res*. It is submitted that this holding of the Supreme Court of Vermont was so arbitrary and unreasonable as to amount to the deprivation of due process of law.

4. The fifteenth assignment of error is:

"15. THE SUPREME COURT OF VERMONT ERRED BECAUSE IT IN LEGAL EFFECT DENIED THE DEFENCE OF ASSUMED RISK TO THE DEFENDANT BECAUSE SAID COURT OVERRULED A MOTION TO INSTRUCT A VERDICT FOR THE DEFEN-

DANT ON THAT GROUND FOR THE TRIAL COURT NOWHERE INSTRUCTED THE JURY ON THE PROPOSITION OF ASSUMED RISK, ALTHOUGH REQUESTED SO TO DO AND THE SUPREME COURT SUSTAINED THIS ACTION OF THE TRIAL COURT." Record, p. 57. And see also in this connection the 34th assignment of error, Record, p. 63.

It appears that the sixth of plaintiff's in error additional requested instructions to the jury was: "Even though the defendant was negligent, if Enoch L. White assumed the risk of his fatal injuries, plaintiff cannot recover." Record, p. 319.

The bill of exceptions shows that "The defendant excepted to the charge of the court as follows: * * * and for failure to charge as requested in additional requests Nos. 1, 5, 6, 7, and 11, and *the exceptions were allowed severally* so far as the charge did not comply with said requests, and so far as said requests were material and stated correct propositions of law." Record, p. 51.

Well, that this requested instruction was "material and stated a correct proposition of law" cannot be questioned.

Seaboard Air Line Ry. vs. Horton, 233 *U. S.* 492, 58 *L. ed.* 1062.

And the charge of the court is *absolutely silent* on the question of assumed risk,—does not even allude to that subject. Record, pp. 301-315. So it is manifest that this exception, to the knowledge of the trial court, reserved for review the question whether it should have granted the requested instruction,—an instruction, be it remembered, directly involving the substantive rights of plaintiff in error under the Federal Employers' Liability Act.

Now hear all that the Supreme Court of Vermont says in disposing of this question so specially and specifically reserved: "Defendant made twelve requests to charge. It excepted to the charge as follows: 'For failure of the court to charge as requested in original requests Nos. 1 to 12 inclusive, and for failure to charge as requested in additional requests Nos. 1, 5, 6, 7, and 11, *and the exceptions were allowed severally* so far as the charge did not comply with said requests, and so far as said requests were material, and stated a correct proposition of law; because the court omitted to say,' etc., particularly specifying certain omissions to charge, and parts of the charge given.

These exceptions other than those particularly specified are too general for consideration. Those so specified will be considered in their order." Record, p. 332.

The holding is merely that this exception, so specifically presented and allowed, relative to such an important matter, in respect of which the charge is absolutely silent, is "too general for consideration,"—the mere "diffused infection" of an exception.

We submit that it is beneath the dignity of this Court to tolerate such an administration of so important a federal statute as the Federal Employers' Liability Act; that the record in respect of this assignment of error shows such action, or inertia, on the part of the Supreme Court of Vermont as amounts to depriving plaintiff in error of due process of law. And we repeat the language of this Court in Chapman vs. Goodnow, *supra*, before quoted: "If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

5. The 25th assignment of error is:

"25. THE SUPREME COURT OF VERMONT ERRED IN HOLDING AND DECIDING THAT THE CONDUCTOR OF 708, THE PURSUING TRAIN ON THE NIGHT OF THE COLLISION, SHOULD BE ALLOWED TO TESTIFY, 'THAT HE RECEIVED A 19 ORDER AT BETHEL AND THAT HE DELIVERED THE ORDER TO THE ENGINEER OF THE TRAIN AND AFTER MAKING THE ORDER COMPLETE THE TRAIN PROCEEDED; THAT WITH THIS ORDER HE RECEIVED A CLEARANCE CARD AND A COPY OF THE SAME WAS THEN GIVEN TO THE ENGINEER, BUT IT DID NOT CONTAIN A RECORD OF ANY TRAIN AHEAD.'" Record, pp. 59-60.

The exception reserving this question is recited at the bottom of page 39 and top of page 40 of the Record. The conductor of 708 was W. L. Wright and the engineer was D. A. McDonald. Record, bottom p. 34. So it is manifest that this exception is in respect of the testimony of conductor Wright, who, and not Gibbons, is the "Witness" referred to in the exception. It is so treated by the assignment of error, and by the opinion of the Supreme Court of Vermont. Record, p. 325.

This question is stated and disposed of by the Supreme Court of Vermont as follows:

"Wm. L. Wright, who was the conductor of 708 on the night of the accident, testified that he received a 19 order at Bethel, and that he delivered the order to the engineer of

the train, and after making the order complete the train proceeded; that with this order he received a clearance card, and a copy of the same was there given to the engineer, but it did not contain a report of any train ahead. Against the objection and exception of the defendant on the ground that rule 221 did not apply in the circumstances of this case, the witness was allowed to testify that there was no notice to him on this clearance card, according to rule 221 and Form A, that the next train ahead was 401, and of the time it left Bethel. It is said in argument that rule 221 was in force, but that the situation on the occasion in question was governed by rule 91, which it is said does not require any notice in the Clearance Card of the freight train ahead when there is another freight train following, if the forward train has been gone five minutes. This involves the construction of those two rules, as applied to the conditions shown by the evidence. Train 401 consisting of low-wheeled engine 401 drawing eighteen loaded and sixteen empty freight cars, and train 708, consisting of engine 708, high-wheeled and faster than engine 401, drawing twelve loaded and twenty-two empty freight cars, were both sent out from White River Junction, destined for Roxbury. Train 401 left White River Junction at 6 o'clock p. m. and 708 at 10:12 o'clock p. m. By reason of delays on the road, 401 did not stop at Bethel until 11:52 p. m. It took water there and left at 12:15 a. m., ariving at Randolph at 12:50. It received a 19 order there stating that No. 6, which was an opposing passenger train, would run so many minutes late. Train 401 left Randolph at 12:54 and arrived at the place of the accident, 1 4-5 miles farther on, at 1:07 a. m. Train 708 arrived at Bethel at 12:30 a. m., where the train order signal was out. There the train received orders and a clearance card, Form A, as stated above, and left at 12:36 a. m., passed Randolph at 1 o'clock without stopping, and arrived at the place of the accident at 1:07 a. m. The evidence tended to show that during this trip those in charge of 708 had no knowledge and received no notice or warning of 401 on the track ahead.

Automatic block signals were not in service on defendant's railroad, but station block signals were. Rule 91 is as follows:

'Unless some form of block signals is used, trains in the same direction must keep at least five minutes apart, except in closing up at stations, but a train must not follow a train carrying passengers or operating a snow plow until a report is received of its arrival at a station ahead, except that a train may follow twenty minutes after the departure of a train carrying passengers or operating a snow plow,

when either the station from which it is to follow or the next station ahead is not a telegraph station, or when communication with the train dispatcher is interrupted, and the wire failure is noted on the clearance.

The train order signal will be used by operators to maintain the intervals required by this rule.

Schedule speed must not be exceeded by sections of trains other than the first section, nor may a train following a train carrying passengers, exceed the schedule speed of such train unless clearance shows arrival at a station ahead.'

And Rule 221:

'A fixed signal must be used at each train order office, which shall indicate 'stop' when trains are to be stopped for train orders. When there are no orders, the signal must indicate 'proceed', except as provided in Rule 91.

When an operator receives the signal '31' or '19' followed by the direction, he must immediately display the 'stop' signal for the direction indicated, and then reply 'stop displayed', adding the direction; and until the orders have been delivered or annulled, the signal must not be restored to 'proceed' except by train order.

A train stopped by a train order signal must not proceed without a clearance card Form 'A' or a caution card Form 'C', although train orders may have been received.'

This rule contains a further paragraph, not material here. A copy of the blank 'Form A', clearance card, prescribed by the defendant's Book of Rules, and of the explanatory note accompanying it therein, appear in the statement of the case.

Since this case in no wise pertains to a train carrying passengers or operating a snow plow, the two rules quoted will be considered solely with reference to freight trains. Rule 91, relating to the movement of trains where no form of block signals is used (as in the case before us), provides that trains in the same direction must keep at least five minutes apart, except in closing up at stations, and that to maintain such interval, operators will use 'the train order signal.' By rule 221 this same signal must be used at each train order office, and shall be made to indicate 'stop', when trains are to be stopped for train orders, and when there are no orders the signal must be made to indicate 'proceed', except as provided in Rule 91, which exception means, as we have seen, when the operator is required by the latter rule to stop a train in order to maintain the required interval between it and the preceding train in the same direction. By rule 221 when a train is stopped by a train order signal,

whether it be for train orders under that rule, or to maintain the interval as required by Rule 91, it 'must not proceed without a clearance card Form 'A' or a caution card Form 'C', although train orders may have been received.' That this construction is in accordance with the contemplation of the defendant's operating rules is seen by referring to blank 'Form A' clearance card therein, with the explanatory note. Blank spaces are left to be filled in and concerning them the note says: 'The numbers of orders for the train must be filled in in figures. When there are no orders the word 'nil' must be writen in. If the next train ahead has not reached the next telegraph office the words 'not yet' must be written in the blank space provided for the time of arrival at the next telegraph office. The other blank spaces are to be filled in as indicated by small type. Operators must keep the lowest copy. Where the Automatic Block Signals are in service instead of Station Block the information relative to the train ahead may be omitted.' The conductor and engineer must each have a copy. The only exception mentioned in the note, to the requirement of information relative to the train ahead, is when Automatic Block Signals are in use. If intended to exclude such requirement as to freight trains, scheduled or extra, it should seem most natural to indicate such intention in connection with the exception made. We think no such exclusion was contemplated, and we hold that Rule 221 was applicable in the circumstances of this case, and that a compliance therewith required the clearance card to train 708 at Bethel, to be filled in to show the next train ahead (No. 401), the time when it left the station at Bethel, and that it had not yet arrived at Randolph. The blank spaces provided in that form of clearance card to be filled in with such information were not filled out at all, a dash being made in each space instead." Record, pp. 325-327.

Let it be remembered that train 401 reached Bethel at 11:52 p. m., and left there at 12:15 a. m. Train 708 arrived at Bethel at 12:30 a. m., (15 minutes after 401 had left there), and left Bethel at 12.36 a. m., 21 minutes after 401 had left Bethel. Record, 325-326.

It is submitted that the Supreme Court of Vermont erred in construing Rule 221 as applicable to the circumstances of this case, and as therein requiring the clearance card to give any notice to train 708 of the freight train 401 ahead, which had left Bethel 21 minutes before 708 left there.

Clearly Rule 91 and Rule 221, *which are standard railroad rules*, should be construed together, and so as to effectuate the manifest intent of each. And, it is submitted,

that it is the manifest intent of Rule 91 that where, as here, no form of block signals is used, freight trains in the same direction are only required to keep five minutes apart, except in closing up at stations; that this five-minute interval is all that is required for safety, and that when, as here, that interval is increased to 20 minutes, the following train may leave the station without any reference in the clearance card to the train ahead. The very *terms* of Rule 221, without the aid of construction, show this. "A fixed signal must be used at each train office, which shall indicate 'stop' when trains are to be stopped for train orders. When there are no orders, the signal must indicate 'proceed', *except as provided in Rule* 91," that is except when the prior train has not gone five minutes when, of course, the signal will not indicate "proceed" till that interval has elapsed.

The construction contended for is that put upon the two rules by the uncontradicted testimony of disinterested expert railroad operating officials, received without objection; by Samuel R. Kramer, Superintendent of the Rutland Railroad, and of extensive railroad operating experience in all parts of the country. Record, 211, 215-217, 219, 222; John Rourke, Assistant Superintendent of the Boston & Maine Railroad. Record 252, 259; John Maun, a railroad conductor for 35 years. Record 182, 189.

The Supreme Court of Vermont turns its decision on the provisions of Rule 221: "A train stopped by a train order signal must not proceed without a clearance card Form 'A' or a caution card Form 'C', although train orders may have been received." But that decision is made without regard to the intent of Rule 91. It is absurd to hold, as did the Supreme Court of Vermont, that it was the combined intent of Rules 91 and 221, that if train 708 found no "train order signal" displayed at Bethel, and knew that 401 had departed 20 minutes before, train 708 might, under the express provisions of Rule 91, at once leave Bethel, without any clearance card referring to train 401; but that, if train 708, on reaching Bethel, found the "train order signal" displayed, and therefore halted there and received the order for the receipt of which it was halted, and which in no way related to train 401, which, to the knowledge of the crew of 708, had left Bethel 20 minutes before, 708 could not at once follow 401, under Rule 91, without any clearance card referring to 401, just as 708 could have done in the case first supposed. There is absolutely nothing in the circumstance that 708 was halted at Bethel to receive an order, (in no way relating to 401), which in any way increased the danger, or modified the conditions, contemplated by Rule 91.

We submit that the point here made clearly presents a

federal question, because the questioned decision of the Supreme Court of Vermont holds, as matter of law, (for the construction of those rules is matter of law), that plaintiff in error, by violation of the requirements of Rule 221, was guilty of an act or omission that might make it liable under the Federal Employers' Liability Act. See Downer vs. Richards, 151 U. S. 658, 38 L. ed. 305.

And besides, the rules were inadmissible to show negligence. Virginia Railway & Power Co. vs. Godsey, (Va.), 83 S. E. 1072; Alabama, etc., R. Co. vs. Clark, 136 Ala. 450; Hoffman vs. Ry. Co., 157 Ga. 655; Fonda vs. Ry. Co., 71 Minn. 438.

Respectfuly submitted,

J. W. REDMOND,

Counsel for Plaintiff in Error.

CENTRAL VERMONT RAILWAY COMPANY *v.* WHITE, ADMINISTRATRIX OF WHITE.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 407. Argued April 23, 1915.—Decided June 21, 1915.

The filing of a large number of assignments of error perverts the purpose of the rule requiring assignments, and the practice cannot be approved. *Phillips* v. *Seymour*, 91 U. S. 648.

On writ of error to review a judgment of the state court in an action under the Federal Employers' Liability Act, this court considers only assignments relating to matters of practice, pleading and evidence involving the construction of the Federal statute.

It was not error in the trial court to refuse to direct a verdict for defendant on the ground that the proof failed to show negligence in allowing a faster freight train to run into a slower train in front of it, the engineer of the former having received notice that the track was clear and that it might proceed. The evidence was sufficient to support a verdict.

The Federal Employers' Liability Act abolishes the fellow servant rule and an employé does not assume risks arising from unknown defects in engines, machinery or appliances.

While matters of procedure depend upon the law of the place where the suit is brought, matters of substance in regard to an action based on a Federal statute depend upon the statute; and in an action under the Employers' Liability Act the burden of proof as to whether the employé was guilty of contributory negligence is a matter of substance and not of mere state procedure.

The Federal courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant, and have enforced the principle even in States which hold, as does Vermont, that the burden is on the plaintiff of proving that he was not guilty thereof.

In passing the Federal Employers' Liability Act Congress intended that it should be construed in the light of the decisions of the Federal courts made prior to the enactment in this respect.

In an action under the Employers' Liability Act rulings of the state court in regard to the effect of amendments and replications are

matters of state pleading and practice and the decisions of the state court are binding on this court.

Under Lord Campbell's Act, and in a few of the American States, the jury apportion damages in cases of death by negligence of defendant, but the omission of this requirement in the Employers' Liability Act indicates the intention of Congress to follow the practice in most of the American States of not requiring such apportionment.

In case the plaintiff sues under the Employers' Liability Act for the benefit of parties not entitled to share in the recovery, and if the verdict is increased as the result of such inclusion, defendant may raise the question in a manner appropriate under the practice of the court in which the trial is had. *North Carolina R. R.* v. *Zachary*, 232 U. S. 248.

Questions of general law in regard to admission of evidence in regard to delivery and contents of written papers and as to inspection of engines which involve no construction of the Employers' Liability Act cannot, under § 237, Judicial Code, be reviewed on writ of error to the state court.

87 Vermont, 330, affirmed.

THE facts, which involve the validity of a judgment for damages for personal injury in an action under the Employers' Liability Act, are stated in the opinion.

Mr. J. W. Redmond for plaintiff in error.

Mr. Warren R. Austin for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

1. On January 12, 1912, Enoch L. White was killed in a rear end collision while employed as brakeman on the Vermont Central, an interstate Railway. His Administratrix sued the Company, in a Vermont court, for "the benefit of the widow and next of kin, minor children." The jury returned a verdict of $7,168. The judgment thereon was affirmed by the Supreme Court of the State (87 Vermont, 330) and the case was brought here on a record containing so many assignments, covering 18

printed pages, as to make it proper to repeat the ruling in *Phillips* v. *Seymour*, 91 U. S. 648 that the "practice of filing a large number of assignments cannot be approved. It perverts the purpose sought to be subserved by the rule requiring any assignments." "It points to nothing and thwarts the purpose of the rule" (*Chicago Great Western Ry. Co.* v. *McDonough*, 161 Fed. Rep. 659) which was intended to present to the court a clear and concise statement of material points on which the plaintiff in error intends to rely. Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, cannot be considered on writ of error from a state court. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 486.

2. We shall, therefore, only consider those assignments, discussed in the brief, which raise a Federal question. Among them is the contention that the court failed to direct a verdict for the defendant because the proof failed to show negligence of the company or to prove the facts necessary to establish liability under the Federal law. *Southern Pac. Co.* v. *Schuyler*, 227 U. S. 601; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248.

The evidence showed that on the night of Jan. 1st, 1912, Enoch L. White was employed by the Central Vermont Railway Company as brakeman on extra freight train No. 401. It had passed several miles north of Bethel, Vermont, and was proceeding up grade at a low rate of speed. White and the other employés thereon had no notice that it was followed by a faster freight train (No. 708), which, at Bethel, had received a "Clearance Card" indicating that the track ahead was clear and that it might proceed. The engine, pulling train No. 708, had a leaking cylinder, from which steam escaped in such

quantities as to make it impossible for the engineer to see the tail lights of the train on which White was employed. The result was that the faster train (708) ran into the slower train (401) and in the collision White was killed. The evidence was amply sufficient to sustain a finding that the death of White was due to the fault of the agents of the Railway Company.

3. Complaint is made because the court failed to instruct the jury as to the law respecting the assumption of risks. But there was not only no request to charge on that subject, but there is no evidence that White knew of the negligence of the agent in giving a "Clearance Card" or of the leaking cylinder which obscured the vision of the engineer. He did not assume the risk arising from unknown defects in engines, machinery or appliances, while the statute abolishes the fellow servant rule. 35 Stat. 65, § 2. Under the facts there was, therefore, no error in failing to charge the jury on the subject of assumption of risks. *Southern Ry.* v. *Gadd*, 233 U. S. 572; *Gila Valley Ry.* v. *Hall*, 232 U. S. 102; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

4. The defendant, however, insisted that White knew his train was behind time and running at a low rate of speed. The Company contended that, in view of these circumstances, it was his duty, under the rules, to put out lighted fusees and torpedoes in order to give warning of the presence of train No. 401 on the track. On that theory the Company asked the court to charge that the burden was on the Administratrix to show that White was not guilty of contributory negligence. In considering that exception the Supreme Court of Vermont held that the defendant's contention was based on a correct statement of the state rule, but said "This case, however, is brought upon an act of Congress which supersedes the laws of the State in so far as the latter cover the same field. Consequently the question of the burden of proof respect-

ing contributory negligence on the part of the injured employé is to be determined according to the provisions of that act, . . . ," Citing *Seaboard Air Line* v. *Moore*, 193 Fed. Rep. 1022; *S. C.*, 228 U. S. 434.

In this court the argument was devoted principally to a discussion of this ruling—counsel for the Railroad Company earnestly insisting that "the *lex fori* must determine all questions of evidence, including that of the burden of proof. Wharton on Conflict of Laws (3d ed.), § 478b." It was argued that there is nothing in the Federal statute indicating an intent to change the state rule as to the burden of proof, and it is claimed that because of the court's mistaken construction of the Federal Act the Railway Company has been deprived of a right to which it was entitled under the laws of Vermont.

There can, of course, be no doubt of the general principle that matters respecting the remedy–such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNiel* v. *Holbrook*, 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662; *Boyd* v. *Clark*, 8 Fed. Rep. 849; *Hollowell* v. *Horwick*, 14 Massachusetts, 188; *Cooper* v. *Lyons*, 77 Tennessee, 597 (2); *Newcombe* v. *Steamboat Co.*, 3 Iowa (G. Greene), 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere

matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law.

But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff. *Railroad* v. *Gladmon*, 15 Wall. 401 (1), 407–408; *Hough* v. *Railway Co.*, 100 U. S. 225; *Inland &c. Co.* v. *Tolson*, 139 U. S. 551 (4), 557; *Washington &c. R. R.* v. *Harmon*, 147 U. S. 581; *Hemingway* v. *Ill. Cent. R. R.*, 114 Fed. Rep. 843. Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in *Sea Board Air Line* v. *Moore*, 228 U. S. 434. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof.

5. There are, however, a series of assignments in this record which must be disposed of in conformity with the general principle that matters affecting the remedy are to be governed by the law of the forum. They are all based on the fact that, while the Railway Company had lines running through Massachusetts and Vermont into Canada, the declaration contained no allegation that White was engaged in interstate commerce at the time of the collision. The Company made this the ground of a plea in bar. The Administratrix thereupon filed a Replication admitting that the deceased was engaged in such commerce at the time of his death. The Company demurred to the Replication on the ground that it was a departure from the cause of action under the state law and the assertion of a new cause of action under the Federal Employers' Liability Law. This demurrer was overruled and after verdict the defendant made the same facts the basis of a motion in arrest of judgment.

The evidence showed a liability under the Employers' Liability Act, and without stopping to discuss whether, on general principles, the motion should not have been overruled because the declaration was amendable to conform to the proof (*Grand Trunk Railway* v. *Lindsay*, 233 U. S. 48; *Toledo, St. L. & Western R. R.* v. *Slavin*, 236 U. S. 454) it is sufficient to say that the Supreme Court of the State held that the defect in the original declaration had been cured by the charge in the plea and the admission in the Replication that White was employed in interstate commerce. That decision on a matter of state pleading and practice is binding on this court.

6. Another assignment relates to the form of the verdict: The administratrix brought suit "for the benefit of the widow and next of kin, minor children." The defendant did not ask the court to instruct the jury to apportion the damages and there was a verdict for the plaintiff for $7,168. The defendant then moved in arrest "because

the verdict of the jury in this case was a general verdict." In this court there was a departure from the language of the exception and error is assigned "because the judgment being *in solido* is void under the Federal Employers' Liability Law for the reason that damages must be apportioned by the jury in accordance with the dependency of the relatives entitled to recover for his death." In support of that contention, the defendant relies on the statement in *Gulf &c. Ry.* v. *McGinnis*, 228 U. S. 176, that "though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss." That statement must be read in the light of the record then before the court. It showed that one of those named as a beneficiary was a married daughter of the deceased living with her husband and supported by him. The jury actually apportioned the damages, so the question as to the validity of a verdict *in solido* was not raised by the record. The quoted language is part of its holding, that it was error to refuse to charge that the married daughter was not a dependent of her deceased father. But there was nothing in that record which would support a ruling that a general verdict was invalid or that the verdict could be set aside because it failed to fix the amount each beneficiary was to receive.

Under Lord Campbell's Act (9 & 10 Vict., ch. 93, § 2) and in a few of the American States the jury is required to apportion the damages in this class of cases. But even in those States the distribution is held to be of no concern to the defendant and the failure to apportion the damages is held not to be reversible error (*Norfolk &c. Ry.* v. *Stevens*, 97 Virginia, 631 (1), 634; *International Ry.* v. *Lehman*, 72 S. W. Rep. 619)—certainly not unless the defendant can show that it has been injured by such

failure. The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the States in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for Probate Courts and not for jurors. If, as in the *McGinnis Case*, the plaintiff sues for the benefit of one who is not entitled to share in the recovery (*Taylor* v. *Taylor*, 232 U. S. 363; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248), and if her inclusion in the suit might increase the amount of the recovery,—the defendant may raise the question, in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery for one not entitled to share in the benefits of the Federal act. But no such question was or could have been raised in the present case, since, as matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father. 35 Stat. 65.

7. Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the "clearance card" and the refusal to permit the Railway Company to show that under the Federal law all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the Federal statute and neither directly nor indirectly affect any

Federal right. Those assignments, therefore, under Jud. Code, § 237; Rev. Stat., § 709, will not be reviewed on a writ of error to a state court. *Seaboard Air Line* v. *Duvall.* See also *Chicago Junction Ry.* v. *King*, 222 U. S. 222 and *Yazoo & Miss. R. R.* v. *Wright*, 235 U. S. 376, which state the rule where similar cases are brought here by writ of error to a Federal court.

Judgment affirmed.